Supreme Court, U.S.
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No. ——

In The
Supreme Court of the United States

SARAH ELLENBERG,

Petitioner,

v.

NEW MEXICO MILITARY INSTITUTE, and the BOARD OF REGENTS OF THE NEW MEXICO MILITARY INSTITUTE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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October 7, 2009

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QUESTION PRESENTED

Whether a school-aged person with current status as a "child with a disability" eligible for special education under the Individuals with Disabilities Education Act is, on the basis of such status, protected from disability discrimination by public schools under Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 572 F.3d 815 (10th Cir. 2009). The opinion of the United States District Court for the District of New Mexico, which was affirmed by the Tenth Circuit, is unreported. Prior decisions are found at 478 F.3d 1262 (10th Cir. 2007) and 2005 U.S.Dist.LEXIS 44761 (D.N.M.2005).

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on July 10, 2009. This petition is timely under Supreme Court Rule 13.1 because it is filed within 90 days of the entry of judgment.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

IDEA, 20 U.S.C.§1401(3)(A) (1997)[1] provides:

> (3) Child with a disability
>
> (A) **In general**
>
> The term "child with a disability" means a child:
>
> (i) with mental retardation, hearing impairments (including deafness), speech

---

[1] This case started in 2003 when the 1997 IDEA was in effect. Subsequent amendments to the IDEA in 2004 have not materially revised any IDEA provision relevant to the issue presented.

> or language impairments, visual impairments (including blindness), serious emotional disturbance (hereinafter referred to as "emotional disturbance"), orthopedic impairments, autism , traumatic brain injury, other health impairments, or specific learning disabilities; and
> (ii) who, by reason thereof, needs special education and related services.

IDEA, 20 U.S.C. §1414(a)(4)(A),(B)(1997) provides:

> (4) Determination of eligibility
> Upon completion of administration of tests and other evaluation materials—
>
> (A) the determination of whether the child is a child with a disability as defined in section 1401(3) of this title shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph(5); and
>
> (B) a copy of the evaluation report and the documentation of determination of eligibility will be given to the parent.

Section 504 of the Rehabilitation Act, 29 U.S.C. §794(a) provides:

> §794 Nondiscrimination under Federal grants and programs.
>
> (a) Promulgation of rules and regulations. No otherwise qualified individual with a disability in the United States, as defined in section 7(20) [29 U.S.C. §705(20)] shall,

> solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

Relevant Section 504 regulations provide:

34 C.F.R. §104.3(j)(1) reads:

> Handicapped persons means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii)has a record of such an impairment, or (iii) is regarded as having such an impairment.

34 C.F.R. §104.3(j)(2)(ii) reads:

> Major life activities means functions such as caring for one's self, performing manual

> tasks, walking, eeing, hearing, speaking, breathing, learning, and working.

34 C.F.R. §104.3(l)(2) reads:

> (l) Qualified handicapped person means:
> (2) with respect to public preschool [,] elementary, secondary, or adult educational services, a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped person, or (iii) to whom a state is required to provide a free appropriate public education under [the IDEA]. . . .

The Americans with Disabilities Act, 42 U.S.C. §12102(2)[2] provides:

> As used in this Act:
> ....
> (2) Disability. The term "disability" means, with respect to an individual—
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such an individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

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[2] Substantial amendments to the ADA effective January 1, 2009, are not applicable to this case which is controlled by the ADA before amendment.

STATEMENT

In the spring of 2003, Sarah Ellenberg, a New Mexico resident who was fifteen years old, applied for admission to New Mexico Military Institute (NMMI), a "state educational institution." *See* N.M. Const. Art. XII, Sec. 11. At the time she applied, Ms. Ellenberg was eligible for special education under the IDEA, as determined by a New Mexico local school district. NMMI rejected her application for admission to its public high school program. The Ellenbergs believed that Sarah was rejected based on disability discrimination since she met all of NMMI's genuine admission requirements.

When Sarah Ellenberg's application was rejected, NMMI's high school admissions materials specified certain "physical standards" and "behavioral standards" as automatically excluding any prospective applicant from admission. The disqualifying "standards," included: "manic-depressive disorder, regularly scheduled psychological counseling or any other severe psychological disorders or limiting condition which in the opinion of the medical staff would interfere with the cadet's ability to function satisfactorily...." The school, which receives both state and federal funds, has never provided special education services. As recently as 2003, NMMI denied that it was subject to Section 504 of the Rehabilitation Act.

The Ellenbergs attempted to exhaust IDEA administrative remedies by filing a Request for IDEA Due Process Hearing with the State Educational Agency against NMMI. After evidentiary hearing, the

final administrative appeal decision was dismissal for lack of jurisdiction or for failure to state a claim.

Parents filed a civil action in United States District Court for the District of New Mexico challenging the IDEA due process administrative decision as well as bringing disability discrimination claims for Ms. Ellenberg under Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act. The United States District Court dismissed all claims. *Ellenberg v. New Mexico Military Instit.*, 2005 U.S.Dist.LEXIS 44761 (D.N.M.2005). On appeal, the Tenth Circuit Court of Appeals remanded for dismissal of the IDEA claims for lack of jurisdiction based on failure to properly exhaust, and reversed and remanded for consideration of the disability discrimination claims. *Ellenberg v. New Mexico Military Inst.*, 478 F.3d 1262 (10th Cir. 2007).

Following remand, the United States District Court, in an unpublished opinion, granted NMMI's motion for summary judgment on the disability discrimination claims. The District Court found that Ms. Ellenberg's reliance on her status as a student who was a "child with a disability" under the IDEA was insufficient to establish that she was a "handicapped" person entitled to protection from discrimination under Section 504 and Title II of the ADA. The Tenth Circuit Court of Appeals affirmed the District Court and ruled that current status as a student who qualifies for receipt of special education under the IDEA is not enough to establish entitlement to protection from disability discrimination by public schools under Section 504 of the Rehabilitation Act and Title II of the ADA. *Ellenberg v. New Mexico Military Inst.*, 572 F.3d 815 (10th Cir. 2009).

This Petition seeks review of the contradictions created for implementation of federal laws regulating delivery of public education if students who receive special education under the IDEA are not also protected from disability discrimination by public schools.

REASONS FOR GRANTING THIS PETITION

This case pinpoints the important federal question of whether the intensely detailed "process" of IDEA is simply for show – or, whether Congressional intent is instead accomplished by understanding how Section 504 of the Rehabilitation Act and Title II of the ADA must be read in tandem with the IDEA to support, not contradict, the federal goal of provision of public education free from discrimination on the basis of disability.

The Tenth Circuit's decision in this case undermines the federal scheme for eradication of discrimination by public schools against school-aged children on the basis of disability. The holding – that a public school student, who is already determined to be "a child with a disability" under the IDEA, must separately "prove" disability status before receiving protection from disability discrimination by the public schools – is inconsistent with the overall legal framework for ensuring public school access, free from discrimination, for students with disabilities.

From 1982 through 2009, this Court's regular attention to interpretation of the text of the IDEA[3] has served to elevate that law – historically, just a legislative tool to ensure access to public education for disabled students – at the expense of proper understanding and implementation of the separate federal laws intended to directly combat disability discrimination, Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act. Federal court interpretation of the IDEA, *ad nauseum,* is simply of little practical help for school children with disabilities if courts are unwilling to enforce the anti-discrimination protections of Section 504 and Title II of the ADA.

Persons with disabilities have historically been denied access to public services, including public education. *See Tennessee v. Lane,* 541 U.S. 509, 525 n.11 (2004). The IDEA was passed by Congress in 1975 to remedy the documented lack of access to adequate public education for children with disabilities across the United States. *See* 20 U.S.C. §1400(c) and *Bd. of Education of Hendrick Hudson Sch.Dist. v. Rowley,* 458 U.S. 176, 192 (1982).

IDEA's mechanism to provide adequate access to public education for school-aged children with disabilities is prescription of the contours for provision of special education linked to delivery of federal funds. IDEA's highly regulated procedures ensure that

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[3] Beginning with *Bd. of Education of Hendrick Hudson Sch. Dist. v. Rowley,* 458 U.S. 176 (1982) and continuing through to *Forest Grove v. T.A.,* ___ U.S.___, 129 S.Ct. 2484 (2009), this Court's jurisprudence on the IDEA has applied a plain reading of the text for issue resolution.

school-aged children are found eligible for special education only after formal evaluation and deliberation by a team of professional school staff and parents resulting in a written decision documenting that the student has a disability which necessitates the receipt of special education. *See* 20 U.S.C.§1414(a)(4)(A)(1997). This is all for the *purpose* of ensuring access to public education. *See Rowley,* 458 U.S. at 191-200, 205-206.

IDEA's process and promise are a charade when public schools can then discriminate on the basis of disability against these same children who have been formally determined to be children with disabilities under the IDEA. The IDEA identification process, resulting in an IEP and "special education" status, rather than being the intended shorthand to clearly identify and set forth the student's need for protections in the receipt of public education, essentially creates a red flag for discrimination on the basis of disability. The Tenth Circuit's decision also creates an illogical underclass of "children with disabilities" in our public schools — those that may be discriminated against on the basis of their school-identified disabilities because they are not "handicapped."

The Tenth Circuit held that Ms. Ellenberg could not prove her status as a "handicapped person," under Section 504 by relying on her current status as a "child with a disability," under the IDEA. 572 F.3d at 822. The Court's admonition that "Ellenberg would need to demonstrate her disability *substantially* limits the major life activity of learning" ignores the infrastructure of IDEA and the importance of context in the implementation of Section 504 and Title II of the ADA. 572 F.3d at 821. Attending school and receipt

of education is the sole occupation of school aged persons during school hours and so is undoubtedly a "major life activity" for them. If IDEA's intricate evaluation procedures have resulted in determination of "disability," the required substantial limitation has been established.

IDEA has multiple eligibility categories. 20 U.S.C. §1401(3)(A)(1997). Not all of them signify a "learning" disability. For instance, IDEA recognizes "speech or language impairments" and "orthopedic impairments" as potential categories of impairment which may impact the child's access to public education. 20 U.S.C. §1401(3)(A)(i). After the school district's formal evaluation process documents that a student meets criteria for one of the enumerated eligibility categories, there is a second step necessary for status as a "child with a disability" under the IDEA: the formally convened IEP team must determine that "by reason of [the eligibility category], [the student] *needs* special education and related services." 20 U.S.C. §1401(3)(A)(ii) (emphasis added).

The required nexus between fitting within one of the IDEA eligibility categories *and* the resulting *need* for special education and related services in order to access public education is synonymous to Section 504 or ADA's initial requirement to establish "handicapped" or disability status. It is impractical and contradictory to impose a second step before a child is protected from disability discrimination by the public schools. It is also illogical to theorize that a student who was determined to be a "child with a disability," through the IDEA's formal process, is not "handicapped" for the purpose of Section 504 and ADA Title II protection. That student is conclusively

impaired in the substantial life activity, for a child, of receiving education. *See Plyler v. Doe,* 457 U.S. 202, 221 (1982)("[E]ducation has a fundamental role in maintaining the fabric of our society.")

Besides being an unnecessary step for a student entitled to special education to have to re-prove her "disability," such requirement is also not contemplated by Section 504 and Title II of the ADA in the context of public schools. In the context of public education, the federal concern over disability discrimination is the impact on a student's *access* to public education. "Access" to public education for students with disabilities is understood broadly to refer both to physical accessibility of the school site and the student's ability to receive benefit from public education. Entitlement to the IEP proves the companion need for protection from discrimination on the basis of disability. There is no identification of a student as being a "child with a disability" under the IDEA, without a deliberate determination that special education was *needed* to *access* public education. This need establishes the necessary impairment which "substantially limits one or more major life activities."

Protection from disability discrimination based on IDEA status is critical in the modern context of rapidly evolving mechanisms for delivery of public school choice. Nationally, the charter school movement and emphasis on increased offerings of higher level academic curricula in high schools (Advanced Placement and "dual-enrollment" classes) have created

new and ongoing "access" issues for students with disabilities.[4]

The Tenth Circuit's opinion disrupts the prescribed legislative framework to ensure access to public education for students with disabilities. Allowing this decision to stand negates both the long-established significance of IDEA's "process" (*Rowley)* and the national commitment to end disability discrimination against children in public schools.

CONCLUSION

For these reasons, Petitioner respectfully requests that this Court grant writ of certiorari.

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[4] In December 2007, the United States Department of Education's Office of Civil Rights provided guidance documenting its concern with reported practices of "conditioning participation in accelerated classes or programs by qualified students with disabilities on the forfeiture of necessary special education. . . ." "Dear Colleague Letter: Access by Students with Disabilities to Accelerated Programs" (Office of Civil Rights, U.S. Dept. of Education, 12/26/2007) found at http://www.ed.gov/about/offices/list/ocr/letters/colleagues-20071226 (last visited 9/30/2009).

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APPENDIX

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 08-2112

[Filed July 10, 2009]

SARAH ELLENBERG,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
NEW MEXICO MILITARY INSTITUTE, and the BOARD OF REGENTS OF THE NEW MEXICO MILITARY INSTITUTE,	)
	)
Defendants-Appellees.	)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D.C. NO. CIV-04-347-PJK/DJS)

Gail Stewart, Steven Granberg, P.A., Albuquerque, New Mexico, for Appellant.

John F. Kennedy, Cuddy & McCarthy, LLP, Santa Fe, New Mexico (Jacquelyn Archuleta-Staehlin and Sarah Piltch, Cuddy, Kennedy, Ives, Archuleta-Staehlin, Fairbanks & Vigil, Santa Fe, New Mexico, and Lee Rogers and Barbara M. Smith-Duer, Atwood, Malone, Turner & Sabin, P.A., Roswell, New Mexico, with him on the brief) for Appellees.

Before **TACHA**, **MURPHY**, and **TYMKOVICH**, Circuit Judges.

TYMKOVICH, Circuit Judge.

Sarah Ellenberg sued the New Mexico Military Institute and its Board of Regents (NMMI) on the ground that in denying her admission, NMMI violated three federal laws protecting persons with disabilities: (1) the Individuals with Disabilities Education Act (IDEA), (2) Section 504 of the Rehabilitation Act (Section 504), and (3) Title II of the Americans with Disabilities Act (ADA).

The district court held Ellenberg could not establish a prima facie discrimination claim under Section 504 and the ADA because she had not offered the required evidence of a disability that substantially limited a major life activity. Ellenberg argues the district court erred, and that her eligiblity for an individualized education program under the IDEA means she automatically satisfies the disability requirements of Section 504 and the ADA.

We conclude the district court correctly found the statutes have different requirements for establishing a disability, and that having an individualized education program under the IDEA does not

automatically establish a disability under Section 504 and the ADA. Exercising jurisdiction under 28 U.S.C. § 1291, we accordingly AFFIRM.

I. Background

We reviewed in detail the facts and procedural history in a prior appeal, *Ellenberg v. New Mexico Military Institute*, 478 F.3d 1262, 1271–73 (10th Cir. 2007), and only briefly summarize them here.

NMMI is a state educational institution in Roswell, New Mexico, offering college preparatory education in a military setting. In 2003, NMMI denied Ellenberg admission, citing behavioral problems manifested in her presence at a residential treatment facility, admitted past drug use, level of medication requirements, and need for continued counseling. At the time NMMI denied Ellenberg admission, she was eligible for special education services under the IDEA and had an individualized education program.[1] Ellenberg sued, arguing NMMI's admissions decision

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[1] The IDEA provides state and local agencies with federal money to ensure that children with disabilities have access to "free appropriate public education" that "meet[s] their unique needs and prepares them for employment and independent living." 20 U.S.C. § 1400(d). To this end, states receiving federal money must create an individualized education program for each disabled child, which includes specially-designed instruction and services that will allow the child to meet certain individualized objectives. § 1412(a)(4).

Ellenberg qualified under the IDEA on the basis of her Oppositional Defiance Disorder, which is recognized by the American Psychiatric Association. *Ellenberg*, 478 F.3d at 1272 n.8.

violated the IDEA, Section 504, and the ADA. The district court rejected the IDEA claim after finding NMMI had satisfied its IDEA obligations. The court further held that NMMI's compliance with the IDEA meant the Section 504 and ADA claims necessarily failed as well.

On appeal, we found Ellenberg had failed to exhaust her administrative remedies and the district court should not have addressed the merits of her IDEA claim. *Id.* at 1267. We remanded the case with instructions to dismiss this claim for lack of jurisdiction. *Id.* The Section 504 and ADA claims were not barred by Ellenberg's failure to exhaust IDEA administrative remedies, though, so we remanded for their reconsideration. *Id.*

Upon remand, Ellenberg filed an amended complaint for damages and declaratory relief, reasserting her claims under Section 504 and the ADA. The parties filed cross-motions for summary judgment; the district court denied Ellenberg's motion but granted that of NMMI. The court did so after finding Ellenberg had failed to make a prima facie showing she was disabled under Section 504 and the ADA. R., Vol. I at 214–16 (Dist. Ct. Order); *see also Jarvis v. Potter*, 500 F.3d 1113, 1121 (10th Cir. 2007) (to establish a prima facie Section 504 claim, a plaintiff must show he or she is "disabled under [Section 504]"); *Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1188 (10th Cir. 2003) (to establish a prima facie ADA claim, a plaintiff must show he or she is "disabled within the meaning of the ADA"). Key to its holding was that Ellenberg's eligibility for special education services under the IDEA and her existing individualized education program did not automatically establish a

prima facie showing of disability under Section 504 and the ADA.

Ellenberg now appeals the district court's order granting summary judgment to NMMI and its denial of her summary judgment cross-motion.

II. Analysis

We review a grant of summary judgment de novo to determine whether any genuine issues of material fact are in dispute and, if not, whether the district court correctly applied the substantive law. *Viernow v. Euripedes Dev. Corp.*, 157 F.3d 785, 792 (10th Cir. 1998).

Ellenberg makes three interrelated arguments: (1) her eligibility for receipt of special education and having an individualized education program under the IDEA make her, by definition, a disabled person protected under both Section 504 and the ADA; (2) her disability claims should be decided by a jury because certain disputed issues of fact exist; and (3) NMMI's facially discriminatory admissions standards violate Section 504 and the ADA.

As we explain below, Ellenberg's failure to offer evidence that her disability substantially impairs a major life activity is fatal to her prima facie case under Section 504 and the ADA. Because we can resolve the case on this first issue as a matter of law, we need not address the latter two arguments.

A. Discrimination Claims Under Section 504

To establish a prima facie case under Section 504, a plaintiff must first demonstrate he or she is an "otherwise qualified individual with a disability." *See* 29 U.S.C. § 794(a); *Hollonbeck v. U.S. Olympic Comm.*, 513 F.3d 1191, 1194 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 114 (2008). The issue here is whether Ellenberg's IDEA eligibility by itself can satisfy this first element.

As an initial matter, NMMI argues we should not consider Ellenberg's argument on this point because she failed to present it below. We disagree. Ellenberg sufficiently raised the argument in her brief to the district court, and the court addressed the argument in its order. We therefore proceed to our analysis of the statute.

1. Section 504 and its Interpretive Regulations

Section 504 does not precisely define eligibility under the Act. That is done by the regulations implementing Section 504, which describe eligible disabled individuals as "qualified handicapped person[s]." 34 C.F.R. § 104.3(1)(2). Relevant to our analysis, a "qualified handicapped person" is "a handicapped person" to whom "a state is required to provide a free appropriate public education under [the IDEA]." § 104.3(1)(2)(iii).[2] In turn, a related provision

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[2] The regulation defines "qualified handicapped person" as:

> [A] handicapped person (i) of an age during which

defines "handicapped person" as one who "has a physical or mental impairment which substantially limits one or more major life activities." § 104.3(j)(1).[3] "[M]ajor life activities" include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." § 104.3(j)(2)(ii).

Interpreting this basic regulatory framework, Ellenberg contends she fits within the definition of "qualified handicapped person." In her view, IDEA eligible individuals are listed among the "qualified handicapped persons" in § 104.3(1)(2); she is an IDEA eligible individual; therefore she is automatically a qualified handicapped person covered by Section 504. For several reasons, we disagree with this conclusion.

First and crucially, Ellenberg's interpretation fails to read the term "qualified handicapped person" from § 104.3(1)(2) in light of the nearby definition of "handicapped person" in § 104.3(j)(1). By focusing on § 104.3(1)(2)'s application of "qualified handicapped person," Ellenberg skips a very important step—i.e.,

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> nonhandicapped persons are provided such services , (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under [the IDEA].

34 C.F.R. § 104.3(1)(2).

[3] The full text of § 104.3(j)(1) reads: "Handicapped persons means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."

determining whether she is a "handicapped person" in the first place.

In our view, to meet the definition of a "qualified handicapped person" under § 104.3(1)(2), one must first satisfy the definition of "handicapped person" under § 104.3(j)(1). In other words, a claimant must demonstrate an impairment that "substantially limits" a "major life activity." Focusing solely on § 104.3(1)(2), as Ellenberg would have us do, would render § 104.3(j)(1) superfluous. We cannot do this, and instead find that a "qualified handicapped person" must first demonstrate a physical or mental impairment that substantially limits at least one major life activity.[4]

But Ellenberg's argument is not necessarily lost at this point. If IDEA eligibility and an individualized education program *always* and *necessarily* means a student has an impairment that "substantially limits" a "major life activity," Ellenberg would automatically satisfy § 104.3(j)(1)'s definition of "handicapped person." Here, Ellenberg could have pointed out (but did not) that § 104.3(j)(2)(ii) specifically identifies "learning" as a "major life activity." Her IDEA related disability, therefore, might satisfy the "major life activity" requirement in § 104.3(j)(1)'s definition of a handicapped person.

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[4] We note that the regulations implementing Section 504 could have listed IDEA eligible individuals as automatically included in the definition of "handicapped persons" in § 104.3(j)(1). They do not.

Still, Ellenberg would need to demonstrate her disability *substantially* limits the major life activity of learning. Doing so is important because "[n]ot every impairment that affects an individual's major life activities is a substantially limiting impairment." *Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 151 (2d Cir. 1998) (quoting *Knapp v. Nw. Univ.*, 101 F.3d 473, 481 (7th Cir. 1996)). Indeed, case law indicates claimants must advance *individualized* evidence that a limitation is substantial in the context of the major life activity as a whole. *See, e.g.*, *Lusk v. Ryder Integrated Logistics*, 238 F.3d 1237, 1240 (10th Cir. 2001); *McGuinness v. Univ. of N.M. Sch. of Med.*, 170 F.3d 974, 978 (10th Cir. 1998); *see also Singh v. George Washington Univ. Sch. of Med. & Health Scis.*, 508 F.3d 1097, 1100–04 (D.C. Cir. 2007); *Waldrip v. Gen. Elec. Co.*, 325 F.3d 652, 656 (5th Cir. 2003).[5]

Here, as the district court noted, Ellenberg failed to put forward a specific argument of substantial limitation. Her failure to do so means we cannot know "whether the particular impairment constitutes a significant barrier for [this] *particular person*," *Knapp*, 101 F.3d at 481 (emphasis added), and thus whether she meets Section 504's disability requirements.

Nor does Ellenberg's mere receipt of an individualized education program under the IDEA by

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[5] The majority of cases cited in this paragraph arise in the ADA context. As described below, however, the Section 504 and ADA standards in this regard are the same.

itself demonstrate a substantial limitation.[6] Unlike a "handicapped person" under § 104.3(j)(1), a disabled child under the IDEA need not be "substantially limit[ed]" in the major life activity of learning. The IDEA defines a disabled child as one "(i) with mental retardation, hearing . . . speech or language impairments, visual impairments . . . serious emotional disturbance . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services." 20 U.S.C. § 1401(3)(A). As NMMI and the district court point out, one may therefore qualify as "disabled" under the IDEA for purposes of that statute without demonstrating a "substantially limit[ing]" impairment.

The IDEA regulation listing the various eligible disabilities bolsters our view. Under 34 C.F.R. § 300.8, disabilities that merit an IDEA individualized education program range from the minimal to the serious. *E.g.*, § 300.8(c)(12) (traumatic brain injury); § 300.8(a)(1) (serious emotional disturbance); § 300.8(c)(3) (deafness); § 300.8(c)(10)(i) (imperfect ability to listen, dyslexia, minimal brain dysfunction); § 300.8(c)(4)(i)(C) ("[i]nappropriate types of behavior or feelings under normal circumstances"). Of course an IDEA disability may—and in the majority of cases probably will—substantially limit a major life activity. But the point here is that it need not, and thus a plaintiff must individually show substantial limitation.

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[6] At summary judgment Ellenberg could have used her particular individualized education program to show specific evidence of substantial impairment, but did not.

We further note that while Section 504 and the IDEA both provide certain forms of relief for individuals with disabilities, they have separate purposes. Section 504 provides relief from discrimination, *see Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 410 (1979), but the IDEA provides relief from inappropriate educational placement decisions, regardless of discrimination, *see Garcia v. Bd. of Educ. of Albuquerque Pub. Schs.*, 520 F.3d 1116, 1129 (10th Cir. 2008) (citing 20 U.S.C. § 1400(d)(1)(A)). "Concomitant to these distinct purposes are separate statutory definitions of what it means to be disabled or handicapped." *Bowers v. Nat'l Collegiate Athletic Ass'n*, 563 F. Supp. 2d 508, 533 (D.N.J. 2008). These definitions may substantially overlap, but we decline to conflate them entirely.

Thus, eligibility for special education and having an individualized education program under the IDEA demonstrate a child's disability, but that disability is not *necessarily* one that "substantially limits" the major life activity of learning. As a matter of law, therefore, Ellenberg cannot rely on the IDEA alone to make her prima facie discrimination claim under Section 504. Instead, she must offer evidence and arguments from that evidence showing her disability is substantial in the context of the major life activity as a whole. She failed to do so here and the district court correctly granted summary judgment.

2. Other Authority

Notwithstanding this regulatory framework, Ellenberg points to several federal and state agency publications to support her contention that IDEA

eligibility can itself establish prima facie claims under Section 504. We do not find these persuasive.

The first agency authority is a guidance manual provided by the United States Department of Education on its Internet website. In particular, Ellenberg cites to a portion of the manual reviewing "frequently asked questions" (FAQ) about Section 504. The guidance states that "a 'qualified student with a disability' [protected by Section 504] is a student with a disability . . . to whom a state is required to provide a free appropriate public education under [the IDEA]."[7] According to Ellenberg, this guidance demonstrates that "students with a disability under the IDEA are automatically protected from disability discrimination under Section 504." Opening Br. at 13.

But in context, the guidance manual confirms our reading of 34 C.F.R. § 104's provisions. In addition to the commentary Ellenberg cites, the Department of Education reiterates that Section 504 eligibility requires a "disability" that "substantially limit's a major life activity," and that such determination "must be made on the basis of an individual inquiry." FAQ 12. The commentary Ellenberg excerpts thus assumes an individual plaintiff already meets the definitional requirements of a "handicapped person" under § 104.3(j)(1)—something Ellenberg has failed to do.

The second agency authority Ellenberg cites is an electronic document from the New Mexico Public

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[7] United States Department of Education, Protecting Students With Disabilities (2009), http://www.ed.gov/about/offices/list/ocr/504faq.html (question 13) (last visited June 11, 2009).

Education Department (NMPED).[8] Like the Department of Education's web page, the NMPED document correctly notes that "[a] student is . . . entitled to a Section 504 Accommodation Plan if . . . the individual has a mental or physical impairment that substantially limits one or more major life activities and it impacts the student's education." NMPED Doc. at 3. Later in the document, however, NMPED erroneously indicates that individuals qualifying under the IDEA "are also already considered to be qualified individuals under Section 504." *Id.* at 6.

The NMPED guidelines, like Ellenberg, conflate the definition of a "disabled" child under the IDEA with the definition of a "handicapped person" under Section 504. Obviously, most IDEA eligible individuals are also handicapped under Section 504, and Ellenberg may be as well. But again, we cannot impose an interpretation of Section 504 at odds with its implementing regulation requirement that a claimant first establish he or she is substantially limited in a major life activity.

Ellenberg also cites several cases to support her argument that IDEA eligibility automatically establishes the disability element of a prima facie claim under Section 504. But most of these cases only stand for the proposition—with which we agree—that Section 504 has a broader scope than the IDEA: while

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[8] New Mexico Public Education Department, Educators and Administrators Implementing Section 504 of the Rehabilitation Act of 1973 (2007), http://www.ped.state.nm.us/RtI/dl09/Section504GuideComplete.pdf#pagemode=bookmarks (last visited June 11, 2009).

the IDEA focuses on the provision of appropriate public education to disabled children, Section 504 addresses the provision of state services to disabled individuals generally. *E.g.*, *Mark H. v. Lemanhieu*, 513 F.3d 922, 929 (9th Cir. 2008); *Weber v. Cranston Pub. Sch. Comm.*, 245 F. Supp. 2d 401, 405–07 (D.R.I. 2003); *but see M.H. v. Mont. High Sch. Ass'n*, 929 P.2d 239, 241 (Mont. 1996) (finding that IDEA qualified students are automatically disabled under Section 504).

These cases do not persuade us that Section 504 necessarily means those with an individualized education program are disabled as a matter of law under Section 504. The unremarkable fact that Section 504 (insofar as it encompasses more *types of claims*) is broader than the IDEA does not change the fact that disability under Section 504 requires something IDEA claims do not—namely, evidence of a "substantial[] limit[ation on] one or more major life activities." 34 C.F.R. § 104.3(j)(1).

In contrast, our view accords with certain federal cases that have declined to find that IDEA eligibility automatically qualifies a person as handicapped under Section 504. As one court notes, the "separate statutory treatments of the terms 'disability' [in the IDEA] and 'handicapped' [in Section 504] make clear . . . [that] a special education student is not necessarily a 'qualified individual with a disability' under [Section 504]." *Bowers*, 563 F. Supp. 2d at 533 (citation omitted); *see also Dohmen ex rel. Dohmen v. Twin Rivers Pub. Sch.*, 207 F. Supp. 2d 972, 975 n.2 (D. Neb. 2002) ("A special education student is not necessarily a 'qualified individual with a disability'" under Section 504.).

These cases recognize the large practical overlap between IDEA eligible students and those handicapped students who may bring a claim under Section 504. "But the *likelihood* of overlap does not . . . mean that a student receiving special education services under the IDEA is *per se* handicapped under [Section 504]," *Bowers*, 563 F. Supp. 2d at 533 (emphasis added), and does not relieve a plaintiff such as Ellenberg of the burden of proving a physical or mental impairment which substantially limits one or more major life activities. *Cf. Andrew M. v. Del. County Office of Mental Health & Mental Retardation*, 490 F.3d 337, 349 (3d Cir. 2007) (legislative history of Section 504 "does not indicate that a violation of the IDEA is a per se violation of [Section 504] . . . . [A] plaintiff must still prove that there was a violation of [Section 504]").

* * *

In sum, Ellenberg has not demonstrated she falls within the meaning of a "handicapped person" for purposes of Section 504, and the district court correctly granted summary judgment in favor of NMMI.

B. Discrimination Claims Under the ADA

Ellenberg also contends that eligibility for special education under the IDEA is sufficient to establish a prima facie discrimination case under the ADA as well.

To establish a prima facie case under the ADA, a plaintiff must first prove he or she "is a qualified individual with a disability." *Gohier v. Enright*, 186 F.3d 1216, 1219 (10th Cir. 1999). As with the Section 504 claim, the issue here is whether Ellenberg's IDEA

eligibility is sufficient to establish this prima facie element.

To satisfy the ADA's definition of disability, a plaintiff must "(1) have a recognized impairment, (2) identify one or more appropriate *major life activities*, and (3) show the impairment *substantially limits* one or more of those activities." *Berry v. T-Mobile*, 490 F.3d 1211, 1216 (10th Cir. 2007) (emphases added) (citation omitted). Because the language of disability here mirrors that of Section 504, our analysis of Ellenberg's ADA claim is the same as it was for Section 504. *See Miller v. Bd. of Ed. of Albuquerque Pub. Schs.*, 565 F.3d 1232, 1245 (10th Cir. 2009) (Section 504 and the ADA involve the same substantive standards); *Cummings v. Norton*, 393 F.3d 1186, 1190 n.2 (10th Cir. 2005) (same).

Because Ellenberg failed to offer evidence showing how her disability substantially limited a major life activity, her attempt to establish a prima facie ADA claim fails as well.

III. Conclusion

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment for NMMI. Because the district court correctly resolved this issue as a matter of law, we need not reach Ellenberg's other arguments.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 08-2112
(D.C. No. 6:04-CV-00347-PJK-DJS)

[Filed July 10, 2009]

SARAH ELLENBERG,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
NEW MEXICO MILITARY INSTITUTE; BOARD OF REGENTS OF THE NEW MEXICO MILITARY INSTITUTE,	)
	)
Defendants-Appellees.	)

JUDGMENT

Before **TACHA**, **MURPHY**, and **TYMKOVICH**, Circuit Judges.

This case originated in the District of New Mexico and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 04cv0347 PK/DJS

[Filed April 8, 2008]

SARAH ELLENBERG,	)
	)
Plaintiff,	)
	)
vs.	)
	)
NEW MEXICO MILITARY INSTITUTE, and the BOARD OF REGENTS of the NEW MEXICO MILITARY INSTITUTE,	)
	)
Defendants.	)
	)

MEMORANDUM OPINION AND ORDER

THIS MATTER comes on for consideration of Defendants' Motion for Summary Judgment filed February 11, 2008 (Doc. 58). Upon consideration thereof,

(1) Summary Judgment Standard. Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the movant is

entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A movant is responsible for identifying the basis of its motion, which it may support with material demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In opposing summary judgment, neither party may rest upon its own pleadings, but must "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2).

When reviewing a motion for summary judgment, a court considers all evidence and reasonable inferences therefrom in the light most favorable to the non-movant; however, that material must contain probative evidence that would allow a trier of fact to find in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986). Disputes about immaterial facts will not preclude summary judgment. Id. at 248.

(2) Background. The parties are familiar with the facts as set out in the Tenth Circuit's opinion remanding this case for consideration of claims arising under Title II of the Americans with Disabilities Act

("ADA")[1] and § 504 of the Rehabilitation Act ("RA").[2] See Ellenberg v. New Mexico Military Institute, 478 F.3d 1262, 1271-73 (10th Cir. 2007). Suffice it to say that in the summer of 2003, Plaintiff was advised that she was "ineligible for selection at this time" to the high school program at New Mexico Military Institute ("NMMI"). Doc. 58, Undisputed Fact 8 (citing Pet. Ex. 12). That decision was upheld by the school's admissions review board based upon Plaintiff's presence at a residential treatment facility, admitted past drug use, her present level of medication requirements, and her need for continued counseling. Ellenberg, 478 F.3d at 1273; Doc. 58 Undisputed Fact 12 (citing Pet. Ex. 14). She was advised:

> After a successful semester in a public or other educational setting without evidence of the problems that resulted in your placement in

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[1] Title II of the ADA provides:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

[2] Section 504 of the RA provides:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. 87 Stat. 394, as amended, 29 U.S.C. § 794(a).

> the residential treatment facility, including no drug use, you may reapply for admission for the spring 2004 semester.

Pet. Ex. 14 at 1; Doc. 58, Undisputed Fact 11. Plaintiff did not reapply for admission pursuant to the offer. Doc. 59, Ex. AA at 57-58. Between August and October 2003, she lived at a psychiatric hospital. Doc. 68 at 3, ¶ 18.[3] In March 2004, Plaintiff was kicked out of her parents' house. Id. at 13.[4] During the Spring of 2004, Plaintiff re-enrolled in Los Alamos High School, was suspended for marijuana paraphernalia possession and became pregnant. Id. at 58, 64, 65.

(3) Narrowing the Lawsuit. Plaintiff seeks damages and a declaratory judgment that NMMI is subject to § 504 of the RA. Doc. 40, at 1, ¶ 1; id. at 7, ¶ 1.[5] This is

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[3] Plaintiff objects to this fact as irrelevant because it is subsequent to her not being admitted to NMMI. Although the court agrees that the pertinent time frame to determine whether liability attached is at the time of the alleged discrimination, NMMI's rejection of the Plaintiff indicated that she could reapply upon fulfilling certain conditions, which she elected not to fulfill. Moreover, Plaintiff seeks damages during this period. Doc. 59 at 22.

[4] Plaintiff objects to NMMI's inclusion of facts that are not part of its specifically numbered facts on which it seeks summary judgment. Doc. 64 at 2. While the court agrees that such facts should be set out as undisputed, Plaintiff has included seven additional facts in its memorandum, supported in turn by 58 facts containing hundreds of other facts. Under the circumstances, the court will consider the facts urged in support of the motion.

[5] Plaintiff also has filed a motion for partial summary judgment seeking a declaratory judgment that NMMI had a policy and practice of discriminating against prospective student applicants

not a class action and Plaintiff is now 21 years old.[6] In light of these circumstances, to the extent that Plaintiff is seeking prospective relief in the form of a declaratory judgment, such a request is moot–the relationship of these parties going forward would not be altered. Moseley v. Bd. of Educ., 483 F.3d 689, 692 93 (10th Cir. 2007).

According to the Plaintiff, "NMMI and Plaintiff agree that her request for damages is limited to the period from July 2003 until January 2004 when her application would allegedly have been reconsidered by NMMI (if she had completed a 'regular' program)." Doc. 64 at 22. Essentially, this is a lawsuit seeking damages based on having to wait six months for reconsideration of the application. Although this claim for damages remains, ordinarily a retrospective declaration is superfluous and Plaintiff has failed to identify how such a declaration will assist her with this claim. PeTA v. Rasmussen, 298 F.3d 1198, 1202-1203 (10th Cir. 2002); Green v. Branson, 108 F.3d 1296, 1300 (10th Cir. 1997).

(4) Individual with a Disability. As part of its argument that Plaintiff cannot make a prima facie case, Defendant argues that Plaintiff has not demonstrated that she is a handicapped individual

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on the basis of disability. Doc. 68 at 3-4; Doc. 69 at 11. Given the dispositive nature of Defendant's motion for summary judgment, all pending motions will be denied.

[6] It would also appear that Plaintiff would not qualify given NMMI's requirement that full-time students be without dependents as Plaintiff has at least one child. Doc. 68, Ex. AA at 46, 50-51.

under the RA or an individual with a disability under the ADA. Doc. 69 at 12-13. A prima facie case under either act requires a Plaintiff to show that she was disabled, that she was "otherwise qualified" to participate in the program, and discriminated against because of the disability, with the RA also requiring that a program receive federal financial assistance. Jarvis v. Potter, 500 F.3d 1113, 1121 (10th Cir. 2007) (RA); Woodman v. Runyon, 132 F.3d 1330, 1338 (10th Cir. 1997) (noting similar standards for prima facie case in RA and ADA). An individual with a disability under the RA and ADA must have a physical or mental impairment which substantially limits one or more of that person's major life activities; a record of such impairment; or be regarded as having such an impairment. 29 U.S.C. § 705(20)(B); 34 C.F.R. § 104.3(j)(1); 42 U.S.C. § 12102(2); cf. 29 C.F.R. pt. 1630, App. § 1630.2(j)-(l). Plaintiff has not directly responded to this argument, and it is by no means unimportant. See, e.g., Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 199 (2002) (individualized assessment necessary in deciding whether an impairment limits a major life activity); Bragdon v. Abbott, 524 U.S. 624, 641-42 (1998) (declining to consider whether HIV infection is a *per se* disability under the ADA); Costello v. Mitchell Pub. Sch. Dist. 79, 266 F.3d 916, 923-24 (8th Cir. 2001); Bercovitch v. Baldwin Sch. Inc., 133 F.3d 141, 155-56 (1st Cir. 1998). Indirectly, she contends that Plaintiff was a student with a disability and that Plaintiff "qualifies as a 'handicapped person' as defined by Section 504 regulation in that NMMI knew she had been identified as a person with psychological or emotional diagnoses through her self-disclosure during the admission process as well as through the IEP

which was in place through Taos Schools. 34 C.F.R. § 104.3(j)(1), (2)." Doc. 64 at 2, 1-E at 11.

Defendants will be granted summary judgment on this point because Plaintiff has the burden of proof on all facets of this issue. See Celotex, 477 U.S. at 322-23; Poindexter v. Atchison, Topeka and Santa Fe Ry. Co., 168 F.3d 1228, 1232 (10th Cir. 1999) (holding that "in order to state a claim under the ADA, a plaintiff must articulate with precision the impairment alleged and the major life activity affected by that impairment"). Defendants admitted that they knew Plaintiff resided in a residential treatment center at the time of her application and that she was eligible for special education services based on her disability under the IDEA and had an IEP. Doc. 41 at 3, ¶¶ 11. But the IDEA's definition of a "child with a disability" does not contain the limitation that the disability substantially limit one or more of that person's major life activities. Rather, in pertinent point, the statutory definition merely requires a child have a serious emotional disturbance or other health impairment and need special education and related services because of the disturbance or impairment. 20 U.S.C. § 1401(3). Moreover, the court declines to anticipate which portion of the definition of an individual with a disability the Plaintiff would rely upon, which major life activity the Plaintiff would rely upon and the evidence that would be marshaled in favor.[7] In light of

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[7] To the extent that Plaintiff might rely upon the major life activity of learning, the court does note that the IEP from Taos schools indicates that Plaintiff's intellectual functioning was high within the average range of intelligence and her academic achievement was within the average range. Pet. Ex. 16. Although the IEP noted some behavioral problems, Plaintiff has not

Plaintiff's failure on this essential element, it is unnecessary to address the remaining contentions.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED that Defendants' Motion for Summary Judgment filed February 11, 2008 (Doc. 58) is granted. All pending motions are denied.

DATED this 8th day of April 2008, at Santa Fe, New Mexico.

/s/ Paul Kelly J.
United States Circuit Judge
Sitting by Designation

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addressed the extent to which these behavioral problems, which were controlled with medication, Pet. Ex. 6 at 2, see Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999), are connected to the disability.

APPENDIX C

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 08-2056

[Filed March 7, 2007]

BOB AND KAREN ELLENBERG, as parents and next friends of S.E., a minor	)
Plaintiffs-Appellants,	)
v.	)
NEW MEXICO MILITARY INSTITUTE; BOARD OF REGENTS OF THE NEW MEXICO MILITARY INSTITUTE,	)
Defendants-Appellees.	)

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. CV-04-00347 PK/DJS)

Gail Stewart (Laurel Nesbitt with her on the briefs), Steven Granberg, P.A., Albuquerque, New Mexico, for Plaintiffs-Appellants.

John F. Kennedy (Samantha J. Fenrow with him on the briefs), Cuddy, Kennedy, Albetta, & Ives, LLP, Santa Fe, New Mexico, for Defendants-Appellees.

Before **LUCERO**, **SILER**,* and **O'BRIEN**, Circuit Judges.

LUCERO, Circuit Judge.

Bob and Karen Ellenberg, the parents of a disabled child residing in New Mexico, appeal the district court's grant of summary judgment in favor of the New Mexico Military Institute at Roswell and its Board of Regents (collectively referred to as "NMMI") on their claims under the Individuals with Disabilities Education Act ("IDEA"), the Americans with Disabilities Act ("ADA"), and § 504 of the Rehabilitation Act ("RA"). They argued that NMMI's denial of their child's application for admission violated all three statutes, and sought a declaration from the district court that NMMI is bound by the IDEA.

The IDEA requires states that accept federal special education funds to provide disabled children with a "free appropriate public education" ("FAPE") in the "least restrictive environment" ("LRE"). It guarantees that such an education is given by instructing states to create an Individualized Education Plan ("IEP") for each child within its care. As part of the bargain, however, Congress requires parents to exhaust IDEA's administrative procedures

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* The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

and remedies before filing suit in federal court. The district court questioned whether the Ellenbergs satisfied this mandate, but nonetheless addressed the merits of the IDEA claim. It was error to do so.

We hold today that before a party may seek relief in federal court alleging a violation of the IDEA's substantive provisions, a party must first request an IEP for the disabled child, or seek a change to a current IEP if one exists, from the agency designated to create that plan under the state's educational framework. Because it is undisputed that plaintiffs never attempted to amend their child's existing IEP or obtain a new IEP before pursuing the IDEA claim, they have failed to exhaust the IDEA's administrative procedures and remedies.

Under our precedent, parties are precluded from bringing claims under the ADA and the RA that are educational in nature if they have failed to exhaust IDEA's administrative procedures, and relief for their injuries is available under the IDEA. Although we hold that plaintiffs have failed to exhaust IDEA's administrative procedures, they are unable to obtain relief under the IDEA for their pure discrimination claims brought pursuant to the RA and ADA, and thus are not barred from bringing these claims in federal court at this time. The district court's sole basis for granting summary judgment to NMMI on these claims was that plaintiffs' IDEA claim failed. Because plaintiffs' claims under the RA and ADA are separate and distinct from the IDEA claim, the district court's ruling in favor of NMMI on this basis was in error.

Accordingly, we exercise jurisdiction pursuant to 28 U.S.C. § 1291, **REVERSE** the district court's grant of

summary judgment in favor of NMMI on the IDEA claim, and **REMAND** with instructions to dismiss that claim for lack of jurisdiction. We **REVERSE** the district court's grant of summary judgment in favor of NMMI on the Ellenbergs' claims under Title II of the ADA and § 504 of the RA, and **REMAND** for reconsideration of the motion for summary judgment on the ADA and RA claims.

I

Before addressing the Ellenbergs' claims, we consider the education law framework under which they seek to be brought. When analyzed in concert, the IDEA, New Mexico's education laws, and NMMI's unique status provide a complex legal backdrop with numerous interconnections, cross-definitions, and a few seeming contradictions.

A

Congress passed the IDEA,[1] a federal spending statute, in response to concerns about the educational opportunities afforded disabled students. Considered an "ambitious federal effort to promote the education of handicapped children," the IDEA "provides federal money to assist state and local agencies in educating

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[1] Formerly titled the Education of the Handicapped Act, the name of the Act was officially changed to the IDEA in 1990. See Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1141. For clarity's sake, we have changed all references to the EHA in prior opinions and legislative materials to the IDEA. All statutory citations refer to the 2000 edition of the United States Code, which was in effect during the relevant period.

handicapped children, and conditions such funding upon a State's compliance with [its] extensive goals and procedures." See Bd. of Educ. v. Rowley, 458 U.S. 176, 179 (1982).

At base, it "ensure[s] that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. § 1400(d). To this end, in order to receive federal funding the state must create an individualized education plan for each disabled child. 20 U.S.C. § 1412(a)(4); See O'Toole ex rel. O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, 144 F.3d 692, 698 (10th Cir. 1998).

> Prepared at meetings between a representative of the local school district, the child's teacher, the parents or guardians, and, whenever appropriate, the disabled child, the IEP sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives.

Honig v. Doe, 484 U.S. 305, 311 (1988) (internal citations omitted); see 20 U.S.C. § 1414(d). Review of IEPs must occur at least annually, and are to be revised as appropriate. Id.

By passing the IDEA, Congress also sought to "mainstream" disabled children, i.e., states must have a goal of providing "full educational opportunity to all

children with disabilities and a detailed timetable for accomplishing that goal." § 1412(a)(2). Each child has a substantive right to receive his or her education in the "least restrictive environment." See § 1412(a)(5)(A). That is, students must be educated "[t]o the maximum extent appropriate . . . with children who are not disabled" in a "regular educational environment." Id. States are prohibited from segregating or otherwise removing disabled children from the regular classroom setting except "when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." Id.; see Honig, 484 U.S. at 311.

In conjunction with this right, "[e]ach public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services." 34 C.F.R. § 300.115(a). Placement decisions must be based on the child's IEP, and made by "a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options." § 300.116(a)(1). Unless a child's IEP requires some other arrangement, the child should be "educated in the school that he or she would attend if nondisabled." Id.

The IDEA also sought to maximize parental involvement in educational decisions affecting their disabled child by granting parents a number of procedural rights. For example, parents are entitled to: (1) examine all records relating to their child, 20 U.S.C. § 1415(b)(1); (2) participate in the IEP preparation process, id.; (3) obtain an independent

evaluation of their child, id.; (4) receive notice before an amendment to an IEP is either proposed or refused, § 1415(b)(3); (5) take membership in any group that makes decisions about the educational placement of their child, § 1414(f); and (6) receive formal notice of their rights under the IDEA, § 1415(d)(1).

Responsibility for implementing the IDEA and policing IDEA compliance rests with the states, subject to the IDEA's limited but specific structural framework. Schaffer ex rel. Schaffer v. Weast, 126 S. Ct. 528, 531 (2005) (citing Rowley, 458 U.S. at 183). Each "State Educational Agency" ("SEA") must enact procedures and policies to implement the IDEA, and ensure both state and local compliance with the Act. 20 U.S.C § 1412(a)(11). "Local Education Agencies"[2] ("LEAs") are given primary responsibility for overseeing the actual provision of special education services to disabled children. See § 1413(a)(1); Gadsby v. Grasmick, 109 F.3d 940, 942-43 (4th Cir. 1997). SEAs ensure LEA compliance through the power of the purse: Federal IDEA funds are distributed to the SEA, and those funds may not be forwarded to LEAs within

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[2] An LEA is

> a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools.

20 U.S.C. § 1401(15)(A).

the state unless they demonstrate compliance with the IDEA to the satisfaction of the SEA. § 1413(a), (d). In addition, the IDEA places an obligation to provide special education services on "public agencies" that are "responsible for providing education to children with disabilities," 34 C.F.R. § 300.53, as well as on "education services agencies" that have "administrative control and direction" over a public secondary school, § 300.12.

Should an LEA or state agency prove "unable to establish and maintain programs of free appropriate public education in compliance with IDEA," the SEA must provide special education and related services directly to disabled children. 20 U.S.C. § 1413(h)(1). In so doing, the SEA "may provide special education and related services . . . in such a manner and at such locations (including regional or state centers) as the State agency considers appropriate." § 1413(h)(2). However, the SEA is required to comply with IDEA requirements as if it were an LEA. 34 C.F.R. § 300.175.

When parents believe their child is not being provided a FAPE in the least restrictive environment, they are entitled to an impartial due process hearing, conducted by either the SEA or the LEA as determined by state law. 20 U.S.C. § 1415(f). If the hearing is held before an LEA, the losing party may appeal to the SEA. § 1415(g). Once state administrative procedures and remedies are exhausted, any party "aggrieved" by the hearing officer's decision has a right to file a civil action in state or federal court. § 1415(i)(2).

B

New Mexico's constitution gives each child the right to a free public education. N.M. Const. art. XII, § 1; see also N.M. Stat. § 22-1-4.[3] The New Mexico legislature has defined this right as an entitlement to attend a public school within the school district[4] in which the student resides. N.M. Stat. § 22-12-4. Students may also attend other public schools within the state subject to availability, as determined by "enrollment preferences." Id.

The New Mexico Public Education Department ("NMPED") (formerly the "State Board of Education") controls, manages, and directs all public schools in the state, and is authorized to promulgate and enforce regulations towards these ends. N.M. Const. art. XII, § 6; N.M. Stat. § 22-2-1. NMPED is the "sole educational agency of the state for the administration or for the supervision of the administration of any state plan established or funds received by the state by virtue of any federal statute relating to aid for education" for the state's general public school system. N.M. Stat. § 22-9-2. At the local level, each school district is governed by a local school board, which is authorized to establish rules governing enrollment in the district's public schools and develop the district's educational policies. N.M. Stat. §§ 22-1-4(e), 22-5-4.

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[3] All references to New Mexico statutes refer to those in effect at the times relevant to this action, unless otherwise specified.

[4] A "school district" is defined as "an area of land established as a political subdivision of the state for the administration of public schools and segregated geographically for taxation and bonding purposes." N.M. Stat. §§ 22-3-54.1, 22-4-1.

New Mexico has long provided special education services to its residents. Although NMPED is required to promulgate rules and standards governing the provision of special education services, local school districts are responsible for directly providing special education and related services to disabled students. N.M. Stat. § 22-13-5. New Mexico has chosen to accept IDEA funds, and has adopted rules to comply with IDEA's requirements accordingly. For purposes of the IDEA, New Mexico's SEA is the NMPED, and its LEAs are generally the local school districts.

NMPED's regulations largely track the federal act, and are "binding on each New Mexico public agency that has direct or delegated authority to provide special education and related services, regardless of whether that agency is receiving funds under the Individuals with Disabilities Education Act." N.M. Code R. § 6.31.2.2. LEAs are tasked with developing IEPs for children within their educational jurisdiction. § 6.31.2.11(A)(3)(g). Should the LEA ultimately determine that the general public school system is unable to meet the needs of a disabled student, it may request that the student be placed in a state-supported educational agency,[5] § 6.31.2.11(J)(1)(c), or in a

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[5] A "state-supported educational agency" is a publicly funded program that

> (a) provides special education and related services to children with disabilities who come within the program's educational jurisdiction;
> (b) is operated by, or under contractual arrangements for, a state school, state educational institution or other state institution, state hospital or state agency; and (c) is primarily funded through direct legislative appropriations

"private school or facility." § 6.31.2.11(L)(1). Neither type of institution is required to admit such student upon referral; rather, it may "consider the child for possible enrollment." § 6.31.2.11(J)(1)(C). If a child is accepted, the accepting institution assumes primary responsibility for providing the child with a FAPE. § 6.31.2.11(J)(2).

C

NMMI is a state educational institution that offers a college preparatory education in a military-style setting to students nationwide, although a preference is given to New Mexicans. N.M. Const. art. XII, § 11; N.M. Stat. §§ 21-12, 22-1-2(V). The parties agree that NMMI is a unique educational institution – it is the only publicly-funded, boarding military high school in New Mexico, and appears to be the only one of its kind in the nation. NMMI is unique in other ways as well. Although it receives substantial state funding, New Mexico does not consider NMMI to be a part of the uniform system of free public schools mandated by the New Mexico Constitution. It is also specifically exempted from NMPED's general oversight and control. § 22-2-2(J). Instead, it is governed by a Board of Regents charged to "maintain and control, at Roswell, a military institute for the education and training of the youth in this country, of as high a standard as like institutions in other states and territories," and promulgate rules and regulations

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or other direct state support to a public agency other than a local school district.

N.M. Code R. § 6.31.2.7(C)(18).

accordingly. § 21-12-3, -4. The Board fixes both NMMI's tuition rate – NMMI must charge tuition under state law – and its admissions standards. § 21-12-1, -2, -4, -7.

NMMI's admissions standards are rather precise: Applicants must have a minimum 2.5 grade point average, satisfactorily complete the on-campus admissions test, be in good physical condition, show respect for others, be able to participate in athletic and leadership development activities, and have no major disciplinary, drug, or alcohol problems. There are also a number of specified disqualifying attributes identified in NMMI's 2002-2003 admissions catalog, including:

> regularly scheduled psychological counseling or any other severe psychological disorders or limiting condition[s] which in the opinion of the medical staff would interfere with the cadet's ability to function satisfactorily at [NMMI], [or a] demonstrated [] inability to meet the existing NMMI academic requirements without significant accommodations that would alter the academic mission of [NMMI].

NMMI is not a New Mexico school district that is required to provide special education services under New Mexico law. See N.M. Stat. § 22-1-2(R). Throughout this litigation, NMMI has taken the position that it is also not bound by the IDEA. Nonetheless, NMMI contends it has admitted disabled applicants as long as they are "otherwise qualified,"

but will not alter its programs to accomodate those with special needs.[6]

D

S.E. is the child of Bob and Karen Ellenberg. In late 2000 S.E. moved to Los Alamos, New Mexico to live with her father, after exhibiting significant behavioral problems while living with her mother in Florida. Unfortunately, S.E.'s problems worsened in New Mexico, where she engaged in high-risk activities, including the abuse of various illegal drugs. When plaintiffs enrolled S.E. at Los Alamos High School ("LAHS"), the public high school serving her school district, they informed school officials about her problems and requested that S.E. be closely monitored. The Ellenbergs did not, however, request that LAHS provide S.E. with special education services.[7] Soon after she started attending LAHS, S.E. stole her parents' car and credit card, prompting the exasperated Ellenbergs to press charges against her. During subsequent court proceedings related to that incident, S.E. received a "Waiver of Time Limitation," under which all charges would be dismissed if she satisfied certain conditions.

One of those conditions was placement in a court-ordered residential treatment program. S.E. was assigned to Casa de Corazon ("CdC"), a treatment facility located in Taos, New Mexico. In November

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[6] NMMI expressly informs potential applicants that its admission standards "may exclude students with specific disabilities."

[7] Her father testified that he did not know he should request such services.

2002, the Taos Municipal School District evaluated S.E. and concluded she qualified for special education services on the basis of an emotional disability.[8] It accordingly prepared an IEP for her, which recommended both a course of study – S.E. was to receive high school curriculum – and a behavioral intervention plan. LAHS was identified in the IEP as S.E.'s public high school based on her residency, but because of her behavioral and social problems the IEP recommended residential treatment elsewhere. Specifically, the IEP team determined that S.E. needed a "small, structured learning environment" and "careful monitoring." CdC, with a professional staff trained to address her unique needs, was thus identified as her LRE. The IEP was to be reviewed one year from the date it was created or at the time of her discharge, whichever occurred first.

S.E. (then fifteen) anticipated being discharged from CdC during the summer following the 2002-2003 school year. Rather than requesting an IEP for the upcoming school year from either the Los Alamos School District or the Taos Municipal School District, her undisputed LEAs for IDEA purposes, the Ellenbergs allowed S.E. to apply directly to NMMI for the fall 2003 semester. In her application packet, the Ellenbergs disclosed that S.E. had previously exhibited "a lot of disciplinary problems," was currently enrolled in a residential treatment program in Taos, was diagnosed with ODD, and was taking medication to control her behavioral problems. They noted, however,

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[8] S.E. was diagnosed with Oppositional Defiance Disorder ("ODD"), a disorder recognized by the American Psychiatric Association.

that S.E. was now determined to change her ways and showed signs of progress on that front. S.E. also included a personal letter outlining her reasons for seeking admission: She "want[s] a good education, and want[s] to be in the military."

In June 2003 NMMI notified the Ellenbergs that S.E. would not be admitted for the fall semester, but would be considered for the winter semester if she demonstrated an ability to succeed in a regular classroom setting. Dissatisfied with that decision, plaintiffs submitted personal letters and testimonials from two of S.E.'s treating therapists at CdC. Although the therapists corroborated plaintiffs' belief that S.E. showed signs of improvement, they noted that S.E.'s difficulties with anger and authority persisted. One therapist recommended that S.E. start at NMMI in August, opining that S.E.'s continued need for a "structured learning environment" would be satisfied at NMMI.[9]

Despite these efforts, NMMI upheld its decision based on (1) S.E.'s presence in CdC, (2) her admitted past drug use, (3) her present medication requirements, and (4) her need for continued counseling. Again, NMMI suggested that S.E. reapply

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[9] At the same time CdC personnel recommended S.E. for admission to NMMI, they prepared a treatment plan for S.E. noting her continuing authority problems, inability to control her temper and impulses, touchy demeanor, difficulty limiting her "cussing," and difficulty in getting along with her peer group. In that plan, they also concluded that she remained depressed, refused to take responsibility for her actions on certain occasions, and continued to have anger outbursts, albeit less frequently and for shorter periods of time.

for the winter semester after demonstrating the ability to succeed in "an educational environment other than a Residential Treatment Facility." The Ellenbergs opted to pursue an alternate approach.

Days later, they filed a request with NMPED for an IDEA administrative due process hearing against NMMI. Plaintiffs argued NMMI's refusal to provide S.E. with a FAPE violated her rights under the IDEA and § 504 of the RA. When NMPED assigned a hearing officer to address the claim, NMMI entered a limited appearance solely for the purpose of contesting jurisdiction. NMMI posited that because it is not a "public school or agency" it is not bound by the provisions of the IDEA or § 504 of the RA. The hearing officer found against NMMI on the jurisdictional question, but ultimately ruled in favor of NMMI on the merits. She concluded that NMMI was not required to provide S.E. with a FAPE under the IDEA or the RA because plaintiffs failed to show S.E. was otherwise qualified to attend NMMI. Both parties filed administrative appeals: NMMI contested the jurisdictional finding; plaintiffs challenged the ruling that S.E. was not otherwise qualified. Concluding that the hearing officer wrongly decided that NMMI was a "public school or agency" bound by the IDEA and the RA, the administrative appeals officer dismissed plaintiffs' claims for lack of subject matter jurisdiction or, in the alternative, failure to state a claim upon which relief could be granted. Their IDEA claim, the appeals officer noted, "borders on being wholly insubstantial and frivolous."

The Ellenbergs then filed a civil action in federal court against NMMI asserting claims under the IDEA, § 504 of the RA, and Title II of the ADA. Although it

recognized "exhaustion concerns" due to plaintiffs' failure to obtain an IEP from an LEA before filing suit, the district court proceeded to address the merits. It first rejected the IDEA claim, interpreting plaintiffs' argument under the IDEA as follows: The IDEA provides students with the right to choose where they will receive a FAPE, i.e., which school is the student's least restrictive environment, and thus S.E. has a right to choose to receive a FAPE from NMMI. In its order, the court found that nothing within the IDEA's provisions cited by plaintiffs "support[s] the theory that special education is merely a service that must be provided wherever the student chooses to attend school." See Ellenberg v. N. M. Military Inst., No. CV-04-00347 PK/DJS, slip. op. at 28 (D.N.M. February 7, 2005). Its findings expressly noted, however, that the court was not addressing whether "NMMI must provide a FAPE for a child with a disability admitted to NMMI." Relying on this circuit's decision in Urban ex rel. Urban v. Jefferson County Sch. Dist. R-1, 89 F.3d 720 (10th Cir. 1996), the court also granted summary judgment to NMMI on the ADA and the RA claims, finding that if the state satisfied its obligations under the IDEA it was not required to do more under the ADA or the RA.

II

We review the district court's grant of summary judgment de novo, applying the same standard employed by the district court. See L.B. ex rel. K.B. v. Nebo Sch. Dist., 379 F.3d 966, 974 (10th Cir. 2004). That standard was described in detail in Nebo Sch. Dist.:

> The IDEA sets up a unique standard for a federal court's review of the administrative due process hearing. A district court applies a modified *de novo* standard in reviewing a hearing officer's decision under the IDEA. It looks at the record of the administrative proceedings and decides, based on a preponderance of the evidence, whether the requirements of the IDEA are met. In so doing, it must give "due weight" to the hearing officer's findings of fact, which are considered *prima facie* correct. Although the district court may accept additional evidence, such evidence is merely supplemental to the administrative record. . . .
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> . . . .
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> . . . Because the IDEA requires a district court to grant a judgment on the record based on its own ascertainment of the preponderance of the evidence, many IDEA claims do not fit into the typical summary judgment standard of "no genuine issues of material fact."

Id. at 973-74 (internal citations omitted). Any legal determinations made by the district court interpreting the IDEA are reviewed de novo. Id.

As an initial matter, it is important to understand what the Ellenbergs are not arguing. They do not claim that either the Los Alamos or Taos Municipal School Districts – S.E.'s LEAs – were unable to provide her with a FAPE. Compare O'Toole ex rel. O'Toole, 144 F.3d at 695. Nor do they claim that S.E. was denied a FAPE or appropriate reimbursement following her admission to NMMI, compare Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993), because S.E.

was never admitted to NMMI. Notably, this is not a suit brought against the State of New Mexico, the Governor, or the head of NMPED, arguing that NMMI's failure to offer special education services (1) violates New Mexico's obligation under the IDEA to have a goal of full educational equality, or (2) categorically denies S.E. a FAPE in the least restrictive environment by limiting the continuum of placements her LEAs may consider. Compare Ass'n for Cmty. Living in Colo. v. Romer, 992 F.2d 1040 (10th Cir. 1993); Eva N. v. Brock, 943 F.2d 51 (6th Cir. 1991); N.M. Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847 (10th Cir. 1982) (challenging New Mexico's state education system based on § 504 of the RA); Bitsilly v. Bureau of Indian Affairs, 253 F. Supp. 2d 1257, 1259-60 (D.N.M. 2003).

Instead, plaintiffs argue: (1) NMMI's failure to offer education services to disabled children, including S.E., caused its denial of her application; and (2) NMMI was required to provide S.E. with a FAPE because she is entitled to an education in the least restrictive environment, which is NMMI.

The Ellenbergs misunderstand the IDEA. In their brief, which relies heavily on anti-discrimination hyperbole, they view the IDEA as a virtual treasure trove providing disabled children with a limitless number of substantive rights. The IDEA, however, is not so broad. It is a spending statute that imposes obligations on the states to provide certain benefits in exchange for federal funds. See Rowley, 458 U.S. at 204 n.26. Although "Congress has broad power to set the terms on which it disburses federal money to the States, . . . when Congress attaches conditions to a State's acceptance of federal funds, the conditions

must be set out 'unambiguously.'" Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S.Ct. 2455, 2459 (2006) (internal citation omitted). Courts engage in a two-step inquiry to determine if a state has satisfied its substantive IDEA obligations. "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" Rowley, 458 U.S. at 206-07. If the answer to both is yes, "the State has complied with the obligations imposed by Congress and the courts can require no more." Id. at 207.

Citing the IDEA's 30-year old requirement that states "establish[] a goal of providing full educational opportunity to all children with disabilities," see 20 U.S.C. § 1412(a)(2), plaintiffs argue that the IDEA requires absolute educational equality. In support, they point to language contained in Congress' recent reauthorization of the IDEA, specifically Congress' finding that it is in the "national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law." 20 U.S.C. § 1400(c)(6) (2005). Plaintiffs, however, have not presented us with a single case from any court recognizing a legally cognizable anti-discrimination claim brought under the IDEA.[10] Moreover, the

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[10] The few cases cited by plaintiffs involve discrimination claims under the ADA, not the IDEA. See, e.g., Padilla ex rel. Padilla v. Sch. Dist. No. 1, 233 F.3d 1268, 1271 (10th Cir. 2000) ("Plaintiff . . . alleged that the school district and the board of education violated her rights under the ADA by excluding her from

Supreme Court has explicitly rejected a similar attempt to transform the IDEA into an anti-discrimination vehicle in a 30-year old case, the very case cited by plaintiffs in support of their view. See Rowley, 458 U.S. at 198 (noting that in passing the IDEA Congress did not intend "to achieve strict equality of opportunity or services" and further holding "the requirement that a state provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential 'commensurate with the opportunity provided other children.'"); see also Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 623 n.6 (1999) (Thomas, J., dissenting) (noting that the IDEA is not a general anti-discrimination statute).

In any event, both claims ultimately fail because the Ellenbergs did not exhaust the IDEA's administrative procedures before filing a lawsuit against NMMI.[11] "As part of the bargain of providing children with educational rights and parents with procedural safeguards to protect those rights, Congress required that parents turn first to the statute's administrative framework to resolve any conflicts they had with the school's educational services." Cudjoe ex rel. Cudjoe, 297 F.3d at 1064. We

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participation in publicly funded general and special education programs based on her disability.").

[11] This issue was not resolved by the district court. As always, however, we have an independent obligation to satisfy ourselves of jurisdiction over this matter before addressing the merits of the claim. See Cudjoe ex rel. Cudjoe v. Indep. Sch. Dist. No. 12, 297 F.3d 1058, 1063 (10th Cir. 2002).

have interpreted the IDEA's exhaustion requirements broadly, noting Congress' clear intention to allow those with experience in educating the nation's disabled children "at least the first crack at formulating a plan to overcome the consequences of educational shortfalls." Id. at 1065; see also Hayes ex rel. Hayes v. Unified Sch. Dist. No. 377, 877 F.2d 809, 814 (10th Cir. 1989) (noting the "philosophy of the [IDEA] is that plaintiffs are required to utilize the elaborate administrative scheme established by the Act before resorting to the courts to challenge the actions of the local school authorities"). In addition, we have recognized the important purposes served by exhaustion, including: (1) "[A]llowing the full development of technical issues and a factual record prior to court review;" (2) "[P]reventing deliberate disregard and circumvention of agency procedures established by Congress;" and (3) "[A]voiding unnecessary judicial decisions by giving the agency the first opportunity to correct any error." Id. (citing Ass'n for Retarded Citizens, Inc. v. Teague, 830 F.2d 158, 160 (11th Cir. 1987)).

Although they advanced through the state administrative process, plaintiffs ignored two of the IDEA's most basic initial steps. First, they did not obtain an IEP from either of S.E.'s undisputed LEAs for the 2003-2004 school year. Compare Nebo Sch. Dist., 379 F.3d at 970-71. Instead, the Ellenbergs unilaterally determined that NMMI was their child's LRE. Second, they did not request a change to S.E.'s then current IEP as prepared by the Taos Municipal School District for the 2002-2003 academic year. At the time S.E. applied to NMMI, that IEP stated that because of her behavioral problems and special needs, CdC was her LRE. If plaintiffs believed S.E. required

a new educational placement, the proper course would have been for them to request a change to her IEP. See 20 U.S.C. § 1414(d)(4). Following that request, should S.E.'s IEP team not select NMMI as her educational placement, plaintiffs would have had the right to challenge that decision via state administrative proceedings.

Failure to exhaust is excused if the relief plaintiffs seek is not "available" under the IDEA. See 20 U.S.C. § 1415(i)(2); Cudjoe ex rel. Cudjoe, 297 F.3d at 1065. Exhaustion is also not required if pursuing administrative remedies would be futile or if "an agency has adopted a policy or pursued a practice of generally [sic] applicability that is contrary to the law." Urban ex rel. Urban, 89 F.3d at 724 (citing H.R. Rep. No. 99-296 (1985)).

Potentially, relief is available to the plaintiffs under the IDEA. Relief is available whenever the plaintiff could attain "relief for the events, condition, or consequences of which the person complains, not necessarily relief of the kind the person prefers." Cudjoe ex rel. Cudjoe, 297 F.3d at 1066. The "dispositive question generally is whether the plaintiff has alleged injuries that could be redressed to any degree by the IDEA's administrative procedures and remedies." Padilla ex rel. Padilla, 233 F.3d at 1274. We do not determine the availability of the relief based on the immediate ability of a plaintiff to attain it, recognizing that "a child may have to go through several procedural steps to take advantage of that remedy." Cudjoe ex rel. Cudjoe, 297 F.3d at 1066. If "the IDEA's ability to remedy a particular injury is unclear, exhaustion should be required . . . . " Padilla ex rel. Padilla, 233 F.3d at 1274.

Although the Ellenbergs characterize the relief they seek as S.E.'s admission to NMMI, their only legally cognizable injury under the IDEA is the state's failure to provide their child with a FAPE in the least restrictive environment. They contend that their child's least restrictive environment is NMMI, as it is the only place where she can receive a military-style education. Because they have ignored the IDEA's procedural requirements, however, we have no way of deciding whether a military-style education is appropriate for S.E.[12] Even assuming her LEA may determine that the only way to ensure S.E. receives a FAPE is to provide her with such education, they could possibly craft an IEP incorporating such a program at her local public school. Should her LEA determine that because of S.E.'s specific needs NMMI is her least restrictive environment, New Mexico law provides for a referral system whereby her LEA could refer her to NMMI.[13] NMMI, with an updated IEP and a better understanding of S.E.'s education needs, would then be able to make an informed decision on whether to admit S.E. based on the LEA's recommendation.

We disagree that requiring the Ellenbergs to request a new IEP from a child's LEA before filing a

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[12] We do not address whether S.E. is entitled to a military-style education under the IDEA. However, it is well-established that the IDEA does not guarantee a particular type of substantive education. See Rowley, 458 U.S. at 207.

[13] In addition, under the IDEA an SEA is obligated to "mak[e] arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures)" to ensure that each child is given a FAPE in her least restrictive environment. 34 C.F.R. § 300.118.

suit, on the ground that the child is not being given a FAPE in the least restrictive environment, would be futile and "without logic." The IEP is the "centerpiece of the [IDEA's] education delivery system." See Honig, 484 U.S. at 311. When a disabled child alleges that the state is failing to provide an education in the LRE, the need for an IEP is especially great. In determining whether an educational placement is a student's LRE, we look to (1) "whether education in a regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily;" and (2) "if not, if the school district has mainstreamed the child to the maximum extent appropriate." See Nebo Sch. Dist., 379 F.3d at 976 (citing Murray ex rel. Murray v. Montrose County Sch. Dist. RE-1J, 51 F.3d 921, 927 n.10 (10th Cir. 1995)). Our review is necessarily fact-intensive, requiring careful analysis of the particular child's needs and abilities. Without a recent IEP prepared at the time the placement at NMMI was requested, neither this court nor a district court has a factual record adequate to determine if NMMI is appropriate for S.E. See Urban ex rel. Urban, 89 F.3d at 724.[14]

Nor are we persuaded that their claims fall within the general applicability exception simply because they

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[14] Nebo Sch. Dist. does not require a different result. In Nebo Sch. Dist., plaintiffs challenged the placement decision identified in the IEP on the grounds that the selected school, which had a high concentration of disabled students, was not the child's LRE. See 379 F.3d at 968. We agreed that, based on the child's IEP, the school district's proposed placement was not the child's least restrictive enviroment. If anything, Nebo School Dist. highlights the importance of obtaining an IEP before initiating litigation over which school constitutes the LRE.

purport to challenge NMMI's policies rather than a specific IEP prepared for S.E. See Romer, 922 F.2d at 1044. "Administrative remedies are generally inadequate or futile where plaintiffs allege structural or systemic failure and seek systemwide reforms." Ass'n for Cmty. Living in Colo., 992 F.2d at 1044. However, in pursuing these claims plaintiffs must show that the policies are contrary to the law and that the underlying purposes of exhaustion would not be served by requiring procedural compliance. Id. Plaintiffs advance a plausible argument that NMMI's refusal to provide special education services to any student per se infringes upon a child's right to an education in the LRE. However, as noted above, without an IEP we do not know if NMMI was S.E.'s least restrictive environment and thus cannot determine whether her rights under the IDEA were violated.[15] Requiring plaintiffs to first pursue administrative procedures and remedies is fully consistent with purposes of exhaustion. See id.

Plaintiffs make an ambiguous assertion that "exhausting administrative remedies against Los Alamos was inconsistent with enforcement of their legal right to seek admission to NMMI, attend NMMI if admitted, and receive such special education services as a NMMI student." Nothing precluded S.E. from applying to NMMI; she applied in May 2003. Because she was not admitted to NMMI, she was not prohibited

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[15] Unlike the plaintiffs in Romer and N.M. Ass'n for Retarded Citizens, plaintiffs are not pursuing a class action on behalf of all similarly situated children. Instead, they bring a claim on behalf of S.E. arguing that her individual substantive right to an education in the LRE has been violated.

from attending NMMI following admission or denied a FAPE once accepted there.

Lastly, we reject plaintiffs' claim that requiring S.E. to obtain an IEP before filing suit is inconsistent with her right to attend NMMI if she is "otherwise qualified." S.E. is not entitled to specify which public agency (or school for that matter) must provide her FAPE or prepare her IEP. Plaintiffs view the IDEA's substantive guarantee of an education in the LRE as a chit, to be cashed in at whatever school she wishes to attend. Once again, this misconstrues the rights of a disabled student under the IDEA, and once again, plaintiffs articulate a position for which they cite no relevant legal authority.

It is to the states, not students, that Congress delegated authority to implement the IDEA. See Rowley, 458 U.S. at 207-08. IDEA's requirements that students receive an education in the LRE do not preclude a state from initially assigning students to local school districts and requiring them to seek an IEP from that school district.[16] Although parents are

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[16] Plaintiffs appear to argue that because S.E. is within NMMI's "educational jurisdiction," NMMI must prepare her IEP. Under New Mexico law, each "public agency" must adopt rules to ensure that all children within its educational jurisdiction are given a FAPE. N.M. Code R. § 6.31.2.9(A). They interpret this provision as follows: Because all New Mexico students are entitled to apply to NMMI, all New Mexico students are in its "educational jurisdiction," and thus NMMI is required to create a FAPE for every New Mexico student that requests it prepare one. New Mexico's specified structure for IEP preparation places that burden on LEAs, and NMMI is unquestionably not an LEA under New Mexico law. If an LEA determines the student requires the services of a state-educational agency, which arguably includes

given a right to participate in the placement decision, states retain "[t]he primary responsibility for formulating the education to be accorded a handicapped child," including the proper educational placement. Rowley, 458 U.S. at 208. Parents may challenge a state's proposed IEP, but courts must defer to the state's proposal if that plan is reasonably calculated to provide the child with a FAPE in the least restrictive environment, even if a parent believes a different placement would maximize a child's educational potential. See Urban ex rel. Urban, 89 F.3d at 727; Lachman v. Ill. State Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1998) (rejecting students' claim that they have a right to choose where they will receive a FAPE); Springdale Sch. Dist. No. 50 v. Grace, 693 F.2d 41, 43 (8th Cir. 1982) (noting that even though a state school for the deaf might provide the best possible option for a student, the IDEA "does not require states to make available the best possible option") (emphasis in original)). Were plaintiffs' interpretation of the LRE provision correct, "much of the IDEA would be unnecessary because all school entities (public or private) would be required to make all their programs available to all potential students, without regard to suitability, qualifications or academic ability." Ellenberg v. N.M. Military Inst., No. CV-04-00347 PK/DJS, slip op. at 29 (D.N.M. Feb. 7, 2005). As the district court correctly noted, "plaintiffs focus on a freestanding substantive guarantee [the right to receive a FAPE in the least restrictive

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NMMI, it may "refer" the student to that agency. N.M. Code R., § 6.31.2.11(J)(1)(c). Even in that context, the agency is not required to immediately accept the student. Plaintiffs' interpretation of New Mexico law is plainly without merit.

environment] without concern for the procedural mechanisms for implementing that guarantee." Id.

Because plaintiffs have failed to exhaust the IDEA's procedural mechanisms, we **REVERSE** the district court's grant of summary judgment in favor of the defendants, and **REMAND** to the district court with instructions to dismiss the Ellenbergs' IDEA claim for lack of jurisdiction.[17]

II

The Ellenbergs also pursue claims under Title II of the ADA[18] and § 504 of the RA.[19] Relying on this

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[17] Because we conclude that plaintiffs have failed to exhaust the IDEA's administrative procedures before pursuing claims in federal court, we do not address whether under the IDEA NMMI is required to provide special education services to a student who is accepted by, or attends, NMMI.

[18] Title II of the ADA provides:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Regulations implementing the ADA prohibit a public agency from denying a disabled person "the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities." 28 C.F.R. § 35.130(b)(2).

[19] Section 504 of the RA provides:

> No otherwise qualified individual with a disability in the

circuit's decision in Urban ex rel. Urban, the district court ruled that because plaintiffs' claim under the IDEA failed, the ADA and RA claims must also fail. Ellenberg v. N.M. Military Inst., No. CV-04-00347 PK/DJS, slip op. at 39-40 (D.N.M. Feb. 7, 2005) (citing Urban ex rel. Urban, 89 F.3d at 727-28 (internal citations omitted)). Because we hold that the district court lacked jurisdiction to address the IDEA claim, the district court's grant of summary judgment in favor of the defendants on these claims, based solely on its finding that the IDEA claim failed, was in error.

We must thus determine whether the dismissal of plaintiffs' IDEA claim for failure to exhaust requires us to also dismiss their RA and ADA claims for lack of jurisdiction. When a plaintiff pursues a claim under the ADA or other law that protects the rights of disabled children, the IDEA "requires her to first exhaust its administrative procedures and remedies prior to commencing her ADA suit [or suit under other federal law] if she is 'seeking relief that is also available under' the IDEA." Padilla ex rel. Padilla, 233 F.3d at 1274 (citation omitted) (emphasis in original).

The IDEA permits plaintiffs to file a complaint "with respect to any matter relating to . . . the provision of a free appropriate public education."

United States, as defined in section 706(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

87 Stat. 394, as amended, 29 U.S.C. § 794(a).

Hayes ex rel. Hayes, 877 F.2d at 813 (citing 20 U.S.C. § 1415(b)(1)(E)) (emphasis and omission in original). Thus, we have held that whenever a plaintiff brings a claim that is "educational in nature" purporting to challenge the provision of educational services by a local school district, the claim is "presumptively redressable" through the IDEA's administrative procedures. See Padilla ex rel. Padilla, 233 F.3d at 1275 (listing cases). This holds true regardless of what statute the plaintiff purports to cite as the basis for the suit. Id.; Hayes ex rel. Hayes, 877 F.2d at 812 ("In other words, when parents choose to file suit under another law that protects the rights of handicapped children-and the suit could have been filed under the [IDEA]-they are first required to exhaust the [IDEA's] remedies to the same extent as if the suit had been filed originally under the [IDEA's] provisions.") (internal citation omitted). The benefits of exhaustion fully support this rule, as it allows educational professionals to have the first crack at designing a program to meet a disabled student's specific needs.

Arguably, plaintiffs' ADA and RA claims are "educational in nature" as they seek resolution of a dispute involving the admission requirements and practices of NMMI, a secondary school. Based on our broad interpretation of the term available, see Cudjoe ex rel. Cudjoe, 297 F.3d at 1066 (citing Padilla ex rel. Padilla, 233 F.3d at 1274), the thrust of the relief the Ellenbergs requested under § 504 could be obtained through the IDEA and thus is presumptively redressable by its provisions.[20] However, the

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[20] Specifically, they seek: (1) reversal of the administrative appeal officer and hearing officer's decisions, (2) a declaratory judgment

presumption regarding exhaustion is simply that, a presumption, and with respect to certain claims presented here, plaintiffs have overcome it.

Plaintiffs contend that NMMI unlawfully discriminated against S.E. in violation of the RA and the ADA by denying her admission on the basis of her disability even though she was "otherwise qualified" to attend, and that NMMI's qualifying admissions standards are "facially discriminatory."[21] In the

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that NMMI is bound by the IDEA and § 504, (3) an injunction requiring NMMI to begin complying with its obligations under the IDEA and § 504, (4) damages for the discrimination suffered by S.E. pursuant to § 504 and the ADA, (5) compensatory education, (6) damages for her lost educational opportunity, and (7) attorney fees and costs as allowed by state law.

[21] The district court found that plaintiffs' claims under the IDEA, the RA, and the ADA were essentially indistinguishable. We understand the district court's frustration with plaintiffs, and recognize that their complaint and subsequent briefing did not provide the clearest articulation of the unique differences between the IDEA, the RA, and the ADA claims they assert. Arguably this failure below stemmed from plaintiffs' understanding that the district court precluded them from presenting their arguments regarding the RA and the ADA in its scheduling order requesting briefing on the IDEA claims, a position the Ellenbergs argued in their opening submission to the district court.

Nevertheless, plaintiffs pled allegations sufficient to establish the separate and distinct nature of the RA and ADA claims. For example, in paragraph 12 of the complaint, they allege that NMMI "had a written policy of excluding students with disabilities from admission to NMMI." In paragraph 13, they contend that this policy was discriminatory. In paragraph 36, they note that NMMI engaged in discrimination by refusing to admit S.E. During a hearing before the district court, NMMI's counsel recognized that plaintiffs were raising separate discrimination claims under § 504 and the ADA. In that same

context of these pure discrimination claims, the IDEA offers no relief, for they do not relate to the provision of a FAPE in the least restrictive environment. Instead, they challenge the alleged discriminatory admissions practices of a state-funded secondary school. As we noted previously, the Supreme Court has long-recognized that the IDEA is simply not an anti-discrimination statute.

Moreover, exempting plaintiffs from exhaustion in this circumstance prevents inefficiency and waste of judicial resources. Limited obligations are imposed on states under the IDEA. Educational experts who develop IEPs must identify the students' LRE and select an educational placement, but they do not decide which schools a student is otherwise qualified to attend. Administrative officers reviewing plaintiffs' IDEA claims must consider the same limited questions that we ask: (1) Has the student been given a FAPE?; and (2) Was the student given a FAPE in the least restrictive environment? Rowley, 450 U.S. at 206-07. At no point would the administrative process offer insight into the merits of a discrimination claim. Requiring exhaustion before the Ellenbergs could pursue their claims under the ADA and RA would create an anomolous result: Plaintiffs who concede a students' IDEA rights have not been violated, or have settled the IDEA claims, would be required to craft an IDEA claim and proceed through the state

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hearing, plaintiffs' counsel stated that the "Section 504 and ADA claims would stand alone" from the IDEA claim, but that such claims do not stand alone for purposes of state administrative procedures because "if there are no IDEA claims, a family does not have the power to file a Section 504 administrative grievance" with NMPED.

administrative process to determine if the students' IDEA rights have been violated. See W.B. v. Matula, 67 F.3d 484, 496 (3d Cir. 1995) (recognizing that plaintiffs would not be required to use the IDEA's administrative framework when they have settled their IDEA claims).

Turning to the merits of the RA and ADA claims, contrary to NMMI's suggestion, our precedent does not hold that a party's discrimination claims under the RA and the ADA must automatically be dismissed if an IDEA claim fails.[22] Any other interpretation of our

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[22] Both NMMI and the district court cited this court's decision in Urban ex rel. Urban for the proposition that if the state provides a student with a FAPE in the least restrictive environment, it has not violated § 504 or the ADA. In Urban ex rel. Urban, plaintiff argued that he was entitled under the ADA to reject the educational placement offered by the school district and attend his neighborhood school. This court noted that the administrative regulations promulgated by the Department of Education pursuant to § 504 "generally conform to the standards established by the IDEA." 89 F.3d at 728. Both regulations "use substantially the same language regarding a school district's obligation to evaluate each disabled child, create an IEP with parental input, and provide each disabled child with an appropriate education." Id. Thus, we concluded that "if a disabled child is not entitled to a neighborhood placement under the IDEA, he is not entitled to such a placement under section 504." Id. However, we specifically noted that "a federally-funded education system may violate § 504 when the school system's practices 'preclude the handicapped from obtaining system benefits realized by the nonhandicapped.'" Id. (citing N.M. Ass'n for Retarded Citizens, 678 F.2d at 855) (emphasis in original); see also Weber v. Cranston Pub. Sch. Comm'n, 245 F. Supp. 2d 401, 406 (D.R.I. 2003) (noting that § 504 is a "bludgeon to the IDEA's stiletto").

Adopting NMMI's reading of Urban ex rel. Urban would also contradict Congress' express legislative mandate that the IDEA should not be "construed to restrict or limit the rights, procedures,

caselaw would mean that a state educational institution that receives public funding could openly discriminate against applicants with disabilities so long as the state offered the student a FAPE in the least restrictive environment. Thus, even if plaintiffs conceded that New Mexico fully satisfied its IDEA obligations with respect to S.E., they could pursue claims under the ADA and the RA on the grounds that S.E. was precluded from receiving a state benefit – military-style education – provided to her non-disabled peers.

Because the district court failed to consider these claims independently from the IDEA claim, we

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and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities." 20 U.S.C. § 1415(*l*). At least one scholar has provided a clear articulation of the interplay between claims under the IDEA and those brought pursuant to § 504:

> In contrast to the IDEA, Section 504 emphasizes equal treatment, not just access to a FAPE. In other words, the drafters of Section 504 were not only concerned with [a student] receiving a FAPE somewhere (as was the case with the IDEA), but also that a federally funded program does not treat [the student] differently because [she is disabled]. Under Section 504, a state special school cannot hide behind the justification that another public school might provide a FAPE; it must show that somehow [the student] does not qualify for admission. Unlike the IDEA, Section 504 does not only look at what is a FAPE, but also what is fair.

Christopher J. Walker, Note, Adequate Access or Equal Treatment: Looking Beyond the IDEA to Section 504 in a Post-Schaffer Public School, 58 Stan. L. Rev. 1563, 1589 (2006).

REVERSE the district court's grant of summary judgment on the ADA and RA claims, and **REMAND** for reconsideration of these claims.

IV

Accordingly, we **REVERSE** the district court's grant of summary judgment in favor of NMMI on the IDEA claim, and **REMAND** with instructions to dismiss that claim for lack of jurisdiction. We **REVERSE** the district court's grant of summary judgment in favor of NMMI on the Ellenbergs' claims under Title II of the ADA and § 504 of the RA, and **REMAND** for reconsideration of the motion for summary judgment on the ADA and the RA claims.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 04cv0347 PK/DJS

[Filed February 7, 2005]

BOB and KAREN ELLENBERG, as parents and next friends of S.E., a minor

Plaintiffs,

vs.

NEW MEXICO MILITARY INSTITUTE, and the BOARD OF REGENTS of the NEW MEXICO MILITARY INSTITUTE,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes on for review of the administrative record concerning Plaintiffs'

Individuals with Disabilities Education Act ("IDEA")[1] claim. Upon consideration thereof,

(1) Procedural Posture. Plaintiffs ("Parents") brought this complaint for damages, injunctive and declaratory relief after their child, S.E. ("Student"), was denied admission to the New Mexico Military Institute ("NMMI"). Parents claim that Defendants, NMMI and its Regents, have violated: (1) the IDEA by depriving Student of a free appropriate public education ("FAPE") in the least restrictive environment; (2) the Rehabilitation Act ("RA"); and (3) the Americans with Disabilities Act ("ADA"). Doc. 1 at 7.[2] At a status conference before this court, the parties agreed that the legal issues associated with the IDEA claim should be considered first after briefing. Doc. 12. Plaintiffs suggest that in considering whether the IDEA applies to NMMI in these circumstances, there can be no reliance on the evidence developed in the merits hearing. See Doc. 15 at 1-2, 9. That is simply too narrow a reading of the stipulated order.

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[1] Congress recently amended the IDEA. See Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647. Thus, the citations are to the Act as amended in 2004, unless otherwise indicated.

[2] The parties have numbered most of the record proper for ease of reference in this proceeding–thus, a sticker "CIV 04-347 Page __" appears on each page and the court will reference those pages with R. at __. Those items not so numbered (transcripts, petitioners' exhibits, and respondents' exhibits for the due process hearings are numbered as Tr. (hearing date) __, Pet. Ex. __, and Resp. Ex. __, respectively. References to pleadings in the district court case file are identified by pleading number, i.e., Doc. __.

This court's jurisdiction over the IDEA claim arises under 20 U.S.C. §§ 1415(i)(2)-(3), which provide that a party aggrieved with respect to the administrative findings and decision has the right to bring a civil action in federal court without regard to the amount in controversy. The court has reviewed the entire administrative record and the parties' submissions and concludes that Parents cannot prevail on their IDEA claim, thus it is unnecessary to hear additional evidence on the appropriate placement of Student pursuant to the IDEA, 20 U.S.C. § 1415(i)(2)(B)(ii). See Doc. 13 at 3-4. The court also concludes that the RA and ADA claims contained in the complaint cannot succeed and the complaint should be dismissed.

(2) Background. In December 2000, Student moved to Los Alamos, New Mexico, from Florida. Tr. (12/10/2003) 763. Student's father is a self-employed insurance adjuster who came to Los Alamos in connection with the work generated by the Cerro Grande fire. Tr. (12/10/2003) 762-63. Student first was enrolled in Cavalry Chapel Christian school in Los Alamos (2000-2001 school year--seventh grade). Tr. (12/10/2003) 763; Pet. Ex. 2 at 8. The next school year, Student chose to be home schooled (2001-2002 school year-eighth grade). Tr. (12/10/2003) 764. After home schooling, Student started ninth grade at Los Alamos High School ("LAHS"), Student's first public school enrollment (2002-2003 school year). Parents did not request special education services at LAHS. Tr. (12/10/2003) 802. According to the father, he didn't know to ask for services, but he informed the school of the many problems Parents were having with Student, and asked the school to keep in close contact about absences or other problems. Tr. (12/10/2003) 850. Student was enrolled in LAHS for a very short time.

See Pet. Ex. 24 at 3 (school records indicate 23 days); Tr. (12/10/2003) 722 (during August and September 2002 according to Student).

Student left LAHS after Parents discovered that Student had (a) spent a weekend unsupervised, (b) taken the family car (Student lacked a driver's license) and a credit card, and (c) not attended school on the following Monday. Tr. (12/10/2003) 729-31, 769. Student's parents turned to the juvenile justice system, resulting in Student's arrest followed by a court-ordered residential treatment program ("RTP") in Taos, New Mexico, on the recommendation of Student's juvenile probation officer. Tr. (12/10/2003) 769, 772; Pet. Ex. 17 at 2. Student was admitted to Casa de Corazon RTP in Taos in mid-November 2002 and evaluated for special education services by the Taos Municipal School District. Pet. Ex. 15 at 15-18; Tr. (12/10/2003) 774. An initial individualized education program ("IEP") was prepared for Student with a course of study and a behavioral intervention plan. Pet. Ex. 16. The IEP Committee recommended that Student was eligible for special education services due to Student's emotional disturbances. Pet. Ex. 16 at 3, 11. The IEP Committee summarized its recommendation as follows:

> [Student] has a history of high risk behaviors accompanied by social problems, thought problems, impulsivity, and signs of depression that require residential treatment outside the home at this time, with educational services provided through a small, structured learning environment with reduced PTR and careful monitoring of [Student's] behavior.

Pet. Ex. 16 at 8. The IEP recognized that Student's neighborhood school was LAHS, but rejected such placement as Student's "high risk behaviors and social functional issues require 24hr/day treatment outside of the home." Pet. Ex. 16 at 5.

In mid-May 2003, Student applied to NMMI for the Fall 2003 semester. Student was still residing at the RTP in Taos, and had diagnoses of bipolar disorder and oppositional defiance disorder ("ODD"). Doc. 1 at 3, ¶ 10; Doc. 6 at 2, ¶ 7. Student's application materials disclosed that Student was in an RTP for ODD and currently taking lithium and seroquel. Pet. Ex. 2 at 1, 6. Student and Parents visited the NMMI campus in early June 2003 for an interview and required testing. Pet. Ex. 11. Student's father informed the admissions officer that the juvenile proceedings against Student were being dismissed as Student had satisfied the sentence requirements. Tr. (12/10/2003) 841-42; Pet. Ex. 6 at 3; see also, Pet. Exs. 11, 17. Student's father arranged for a conference call between an NMMI admissions representative and Student's therapist in support of the application. Pet. Ex. 7; Tr. (12/10/2003) 835-37. Student also wrote a letter on Student's own behalf. Pet. Ex. 8.

On July 1, 2004, Student received notice that the application had been referred to the Admissions Committee for not meeting one or more of NMMI's admission requirements. Pet. Ex. 9. On July 14, 2003, NMMI rejected Student as ineligible for selection. Pet. Ex. 12. Student appealed to the NMMI Admissions Review Board, which upheld the rejection stating in pertinent part:

> The decision of the Board reflects the desire of New Mexico Military Institute to see that you can demonstrate an ability to succeed in an educational environment other than a Residential Treatment Facility. Your presence in the facility, your admitted past drug use and experimentation, and your present level of required medication and continued counseling, has resulted in a determination that NMMI is not presently the appropriate educational environment for you. After a successful semester in a public or other educational setting without evidence of the problems that resulted in your placement in the residential treatment facility, including no drug use, you may reapply for admission for the spring 2004 semester.

Pet. Ex. 14 at 1.

Student stayed at Casa de Corazon until the end of August 2003, and then transferred to Desert Hills Behavioral Treatment Center in Albuquerque, where Student attended a charter school, La Academia de Esperanza. Pet. Exs. 25 at 21, 26 at 1-3; Tr. (12/10/2003) 779-80, 812, 818. Student stayed there during September and October 2003, and then returned to Parents' Los Alamos home and home schooling. Tr. (12/10/2003) 741, 812-13. Subsequently, Student decided to go off medications on her own. Tr. (12/10/2003) 755, 783-85. Student did not want to enroll in LAHS pending an attempt to gain admission to NMMI because Student thought it would be pointless to become involved in activities and possibly have to leave. Tr. (12/10/2003) 756. Further, Student's father testified that he rejected the idea of re-enrolling Student in LAHS for two reasons. Tr. (12/10/2003) 846.

First, after the time in the RTC, he thought it would be disruptive to have Student in public school for a semester, rather than going right to NMMI. Tr. (12/10/2003) 846. Second, given Student's past social relationships in Los Alamos, he thought it would be a mistake to return Student to LAHS. Tr. (12/10/2003) 846-47.[3]

(3) Due Process Proceedings and the Administrative Appeal. Plaintiffs filed a request for due process with the New Mexico Public Education

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[3] Student's father testified:

> [Student] was making a concerted effort to change. Los Alamos is where [Student] got in trouble. When we moved here, [Student] was like, 12, 13 years old. This is where [Student] began to get in serious trouble. This is where [Student] first started to try drugs and everything else.
>
> In the environment in Los Alamos, you know, . . . it's a small town, everybody knew [Student]. So the half that [Student] used to hang out with that [Student] shouldn't hang out with would be there. And quite frankly, you know, [Student] didn't hide [Student's] lifestyle. So a lot of the kids that would be good peer choices I didn't think would have anything to do with [Student] when [Student] came back, you know. And if [Student] wanted to come back there, fine. But [Student] was making the decision to try to change [Student's] life, and I felt like it would be a mistake to bring [Student] to Los Alamos High School and put [Student] there and say, ["]Yeah, sure, go to school with all your old druggie friends that you used to hang out with and do things with, and if in that environment, you can succeed, maybe you'll make it at NMMI.["] I thought it was a ludicrous proposition and so did [Student's] therapist.

Tr. (12/10/2003) 846-47.

Department[4] ("NMPED") contending that NMMI's refusal to admit Student violated the IDEA and the RA. In a letter to the parties, the NMPED noted "the crucial threshold question in this case appears to be whether NMMI owes any duties to [Student] under the IDEA or Section 504 [of the RA]." R. at 140. NMMI contested jurisdiction, taking the position that the provisions of the IDEA, RA, and state special education standards relied upon by the Plaintiffs do not apply to NMMI. R. at 146. After briefing and an evidentiary hearing, the due process hearing officer ("DPHO") rejected these propositions in a memorandum opinion and order. R. at 242-66. She concluded that NMMI was a "public school or agency" within the meaning of the IDEA. R. at 252. Thereafter, another evidentiary hearing on the merits was convened and at the close the Plaintiffs' case, the DPHO made an oral ruling, granting judgment as a matter of law in favor of NMMI. Tr. (12/10/2003) 955-56. The DPHO found that Plaintiffs had not demonstrated that Student had met the standards of admission, been denied due process, or otherwise been discriminated against on the basis of disability. Tr. (12/10/2003) 956-58.

Both sides appealed to the Administrative Appeal Officer ("AAO"). NMMI appealed the jurisdictional decision, and Parents appealed the DPHO's grant of judgment in favor of NMMI as a matter of law. R. at 6.

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[4] At the time, the public education department was the state department of education. A constitutional amendment resulted in a cabinet-level public education department headed by a secretary of public education and a public education commission. N.M. Const. art. XII, § 6. The statutory provisions continue to refer to a state board of education. See, e.g., N.M. Stat. Ann. § 22-2-1.

The AAO held that the DPHO should not have heard Parents' IDEA claim for lack of jurisdiction, or in the alternative, for failure to state a claim upon which relief can be granted. R. at 20. "Having refused to accept Student into the NMMI program and absent a referral to the NMMI program from either of Student's proffered [local education agencies ("LEAs")] [Los Alamos Public School or Taos Municipal Schools], Student's RTC or other public agency, there is no obligation upon NMMI to provide Student with [a] FAPE." R. at 12. Given the lack of a viable IDEA claim, the AAO dismissed the RA claim without prejudice. R. at 20.

(4) Standard of Review. The IDEA requires the court to consider the records of the administrative proceedings, hear additional evidence at a parties' request, and base its decision on the preponderance of the evidence, granting such relief as appropriate. 20 U.S.C. § 1415(i)(2)(B). Unlike summary judgment or a review of an administrative decision for substantial evidence, this court applies a modified de novo standard of review to the administrative proceedings below. L.B. ex rel. K.B. v. Nebo Sch. Dist., 379 F.3d 966, 973 (10th Cir. 2004); Murray v. Montrose County Sch. Dist. RE-1J, 51 F.3d 921, 927 (10th Cir. 1995). In this case, there are two decisions, one from the DPHO and one from the AAO. In such circumstances, due weight is to be given to the AAO's decision on issues which she disagreed with the DPHO, unless the DPHO's decision involved credibility decisions, which the record supports. O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, 144 F.3d 692, 699 (10th Cir. 1998). Legal conclusions are reviewed de novo. Id.; Nebo Sch. Dist., 379 F.3d at 974. Although the AAO rejected many findings of fact made by the DPHO as

unnecessary, R. at 9, the dispute in this case is primarily legal, resting upon historical facts and the law.

The court agrees with the AAO that the DPHO had jurisdiction to consider the request for due process given that the IDEA provides for an impartial due process hearing "with respect to *any* matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free and appropriate public education to such child." 20 U.S.C. §§ 1415(b)(6) (emphasis added), (f)(1); 34 C.F.R. § 300.507(a); N.M. Admin. Code tit. 6, § 31.2.13(I)(1). The New Mexico regulations allow for RA claims to be heard concurrently. Id. § 31.2.13(I)(1)(b). The claims in this case are not wholly insubstantial and frivolous, notwithstanding that this court has serious reservations about exhaustion; however, they do depend upon a construction of the IDEA that both this court and the AAO reject. Cf. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998); Hagans v. Lavine, 415 U.S. 528, 536-38 (1974).

(5) IDEA Overview. A major objective of the IDEA is to provide disabled children with "a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. § 1400(d); 34 C.F.R. § 300.1; N.M. Admin. Code tit. 6, § 31.2.6. The Tenth Circuit recently provided an overview applicable to most cases:

> The IDEA provides federal grants to states, which the states then give to [LEAs] to assist in educating students with disabilities. Fowler v.

> Unified Sch. Dist. No. 259, 107 F.3d 797, 801 (10th Cir.1997)[, vacated on other grounds by 521 U.S. 1115 (1997)]. The IEP is the basic mechanism through which each child's individual goals are achieved. Murray, 51 F.3d at 925. The IDEA contains both procedural requirements to ensure the proper development of an IEP, and substantive requirements designed to ensure that each child receives a FAPE. Id. States must comply with the IDEA's requirements, including providing each disabled child with a FAPE in an LRE [least restrictive environment], in order to receive funds under the statute. 20 U.S.C. § 1412(a)(1) and (a)(5).

Nebo Sch. Dist., 379 F.3d at 974; see also Bd. of Educ. of Hendrick Hudson Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 (1982). The Parents' request for due process alleged that NMMI, as a state-supported secondary school, was required to provide Student a FAPE. R. at 118-19; cf. Nebo Sch. Dist., 379 F.3d at 975 n.13 (school district failing to provide a FAPE violates IDEA's substantive provisions). Parents contended that (1) if NMMI accepted Student, NMMI would be required to ensure a FAPE, and (2) Student was within the educational jurisdiction of NMMI. R. at 119. Parents analogized NMMI to an LEA. R. at 119; see also Tr. (12/10/2003) 951 (DPHO suggesting that NMMI is an LEA).

(6) Definitions. To understand this theory, it is necessary to consider a few IDEA definitions. A "free appropriate public education" means:

> special education and related services that--

> (A) have been provided at public expense, under public supervision and direction, and without charge;
> (B) meet the standards of the State educational agency;
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
> (D) are provided in conformity with the individualized education program required under [20 U.S.C. § 1414(d)].

20 U.S.C. § 1401(9); 34 C.F.R. § 300.13; N.M. Admin. Code tit. 6, §§ 31.2.7(B)(5), (C)(7). An "individualized education program" is "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with [20 U.S.C. § 1414(d)]. 20 U.S.C. § 1401(14); 34 C.F.R. §§ 300.15, 300.340(a). It is prepared with input from the child's regular and special education teachers and the child's parents, and reviewed at least annually and revised as needed to ensure an appropriate education. See Erickson v. Albuquerque Pub. Schs., 199 F.3d 1116, 1118-19 (10th Cir. 1999). It reflects the child's abilities, special education goals, and the particular services the child will receive in furtherance of those goals. Id.

A "local educational agency"

> means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such

> combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools.

20 U.S.C. § 1401(19)(A); 34 C.F.R. § 300.18(a). It may include "an educational service agency" and "any other public institution or agency having administrative control and direction of a public elementary school or secondary school," 20 U.S.C. § 1401(19)(B)(ii), "including a public charter school that is established as an LEA under State law." 34 C.F.R. § 300.18(b)(2). Educational service agencies and other public institutions or agencies include "(i) an educational service agency; and (ii) any other public institution or agency having administrative control and direction of a public elementary school or secondary school." 20 U.S.C. § 1401(19)(B); 34 C.F.R. § 300.18(b). An "educational service agency" ("ESA") includes a "public institution or agency having administrative control and direction over a public elementary school or secondary school." 20 U.S.C. § 1401(5)(B); 34 C.F.R. § 300.10(b). A "public agency" is a catchall category that includes the state educational agency ("SEA"), LEAs, ESAs, and public charter schools not otherwise included as LEAs or ESAs (or their schools), as well as any other state political subdivisions "responsible for providing education to children with disabilities." 34 C.F.R. § 300.22.

(7) The IDEA's Reach. When the State receives payments pursuant to the IDEA, the Act's regulations are binding upon "all political subdivisions of the State that are involved in the education of children with disabilities" including the SEA, LEAs, ESAs, public charter schools not otherwise included, other state

agencies and schools, and state and local and adult correctional facilities. 34 C.F.R. § 300.2(b)(1). The IDEA regulations "[a]re binding on each public agency in the State that provides special education and related services to children with disabilities, regardless of whether that agency is receiving [IDEA] funds . . . ." 34 C.F.R. § 300.2(b)(2); accord N.M. Admin. Code tit. 6, § 31.2.2.[5] The SEA has overall responsibility for insuring the IDEA provisions are met and that "all educational programs for children with disabilities in the State, including all such programs administered by any other State agency or local agency" are under the general supervision of, and meet the standards of, the SEA. 20 U.S.C. § 1412(a)(11); 34 C.F.R. § 300.600(a); Bitsilly ex rel. Deuet-Yazzie v. Bureau of Indian Affairs, 253 F. Supp. 2d. 1257, 1264 (D.N.M. 2003). In circumstances where a student is served by a public agency other than an LEA, the SEA is ultimately responsible for ensuring a FAPE.[6] 34 C.F.R. pt. 300 app. A at 109 (Q & A #15).

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[5] New Mexico's rules implementing the IDEA provide:

> The requirements of these rules are binding on each New Mexico public agency that has direct or delegated authority to provide special education and related services, regardless of whether that agency is receiving funds under the Individuals with Disabilities Education Act (IDEA) and regardless of whether it provides special education and related services directly, by contract or through other arrangements such as referrals by the agency to private schools or facilities.

N.M. Admin. Code tit. 6, § 31.2.2.

[6] Plaintiffs did not name the SEA (public education department) in their request for due process or in this complaint.

(8) NMMI's Characteristics. NMMI provides instruction for grades 9-12 in addition to post-secondary education and is supported with a variety of public funding sources. R. at 245, ¶ 3; at 249-52, ¶¶ 31-55. Plainly, NMMI is a secondary school which is defined by the IDEA as "a nonprofit institutional day or residential school, including a public secondary charter school, that provides secondary education, as determined under State law, except that it does not include any education beyond grade 12." 20 U.S.C. § 1401(27)[7]. NMMI is a state educational institution,[8] governed by a board of regents that is required to set admissions standards and charge tuition. N.M. Const. art. XII, §§ 11 & 13; N.M. Stat. Ann. §§ 21-1-1(A), 21-1-2(A). The board of regents are "to maintain and control, at Roswell, a military institute for the education and training of the youth of this country." Id. § 21-12-3. Until 1996, the state board of education acting through the state department of education exercised some accreditation oversight, but the statute was amended in 1996 to exclude NMMI. N.M. Stat. Ann. §§ 22-2-5 (1996)

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[7] NMMI provides a secondary education of a military nature. R. at 245, ¶ 3.

[8] For purposes of New Mexico's Public School Code, N.M. Stat. Ann. § 22-1-1, NMMI is considered a state agency, a state institution, or a state educational institution. Id. § 22-1-2(W) (state agency or state institution), (X) (state educational institution); N.M. Stat. Ann. § 22-2-2(J) (state institution); see also id. § 22-12-2(A) (compulsory school attendance law may be satisfied by attendance at "state institution"). Not being part of a school district or a charter school under state law, NMMI is not a public school under the Public School Code. See id. § 22-1-2(L). NMMI does not consider itself responsible for enforcement of the compulsory school attendance law. R. at 249, ¶ 30.

(repealed 2004), 22-2-2(J) (1996) (amended 2004) (current version at § 22-2-2(D)); R. at 245-47, ¶¶ 5-11; Tr. (12/9/2003) 486-88. NMMI operates rather autonomously from the state department of education. R. at 247-48, ¶¶ 13-21.

(9) New Mexico's Implementation of the IDEA. New Mexico constitutionally provides for a "uniform system of free public schools." N.M. Const. art. XII, § 1. A "free public school education" is provided through public schools in school districts. N.M. Stat. Ann. § 22-1-4(A), (C), (E). N.M. Stat. Ann. § 22-13-5 provides in pertinent part:

> School districts shall provide special education and related services appropriate to meet the needs of all children requiring special education and related services. Regulations and standards shall be developed and established by the state board for the provision of special education in the schools and classes of the public school system in the state and in all institutions wholly or partly supported by the state. The state board shall monitor and enforce the regulations and standards.

Thus, school districts are required to provide special education and related services. N.M. Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847, 854 (10th Cir. 1982). The state board is also required to adopt regulations and standards for the provision of

such education in state-supported institutions. N.M. Stat. Ann. § 22-13-5.[9]

New Mexico has legislatively mandated that the state board of education participate in the IDEA. See id. § 22-2-2(X) (requiring the state board to submit a plan for applying for funds under IDEA's predecessor and disburse the funds in accordance with the plan). A 1984 Attorney General Opinion concluded that the state board of education had adequate authority to establish special education standards and enforce them for all public schools and institutions receiving public money, including NMMI, pursuant to N.M. Stat. Ann. §§ 22-13-5, 22-2-2(X). N.M. Op. Att'y Gen. No. 84-18 (1984). The opinion concluded that such an exercise of power did not destroy the primary power of the board of regents to control and manage the institutions. Id. Regarding NMMI, the opinion relied upon "the limited special education services provided by [it] to handicapped children" to support its conclusion. Id. Of course, this opinion predates the 1996 amendment removing state board accreditation oversight of NMMI. N.M. Stat. Ann. § 22-2-2(J) (amended 2004)(current version at § 22-2-2(D)). Regardless, the opinion does not suggest what NMMI's responsibilities would be under such special education standards.

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[9] Plaintiffs point out that New Mexico has a constitutional provision requiring compulsory school attendance for "[e]very child of school age and of sufficient physical and mental ability." N.M. Const. art. XII, § 5. No one has claimed that the provision by negative inference deprives the student in this case and it is unnecessary to consider its implications.

Pursuant to the state statutory command and consistent with its obligations as an SEA, 20 U.S.C. § 1412(11); 34 C.F.R. §§ 300.600(a)(1)-(2), the public education department has issued regulations implementing the IDEA. N.M. Admin. Code tit. 6, ch. 31, pt. 2; see also Mo. Dep't of Elementary and Secondary Educ. v. Springfield R-12 Sch. Dist., 358 F.3d 992, 999-1000 (8th Cir. 2004) (discussing responsibilities of an SEA). The department has carefully defined a "state-supported educational program" as one that "provides special education and related services to children with disabilities who come within the program's educational jurisdiction." N.M. Admin. Code tit. 6, §§ 31.2.7(C)(16),[10] 31.2.9 (public agencies responsible for IDEA compliance for "children with disabilities who reside within the agency's educational jurisdiction").[11] The department also has

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[10] The regulation provides:

> A "state-supported educational program" means a publicly funded program that
> (a) provides special education and related services to children with disabilities who come within the program's educational jurisdiction;
> (b) is operated by, or under contractual arrangements for, a state school, state educational institution or other state institution, state hospital or state agency; and
> (c) is primarily funded through direct legislative appropriations or other direct state support to a public agency other than a local school district.

N.M. Admin. Code tit. 6, § 31.2.7(C)(16). NMMI is funded primarily from the Land Grant Permanent Fund. R. at 251, ¶ 45.

[11] The regulation defines "educational jurisdiction" of a public agency in pertinent part as including "the geographic area, age range and all facilities or programs within which the agency is

considered placements in or referrals to "a state-supported educational program or facility by another public agency." Id. § 31.2.11(J)(1)(a). The regulations carefully condition such placement on an IEP team request, compliance with the IDEA, and do not require the state supported educational program to accept in every instance. Id. § 31.2.11(J)(1)(c); see also id. § 31.2.11(J)(2) ("A state-supported educational program that accepts a child with a disability . . . without a referral or appropriate participation by the public agency that has primary responsibility for serving the child assumes all responsibility for [providing a] FAPE.").

(10) Disposition. Although the reach of IDEA is expansive, it plainly contemplates that a public educational entity subject to its provisions be responsible or involved in providing education to children with disabilities. See 20 U.S.C. §§ 1412(11)(A)(ii) (SEA responsibilities for "all educational programs for children with disabilities in the State, including all such programs *administered* by any other State agency or local agency") (emphasis added), 1413(a)(1)-(2) (LEA eligible for assistance *in providing* special education within its jurisdiction) (emphasis added); 34 C.F.R. §§ 300.2(b)(1) (applicability of IDEA regulations "to all political subdivisions of the State that are *involved* in the education of children with disabilities") (emphasis added), 300.22 (public agency must also be "responsible for providing education to children with

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obligated under state laws, rules or regulations or by enforceable agreements to provide educational services for children with disabilities." N.M. Admin. Code tit. 6, § 31.2.7(C)(6).

disabilities."); N.M. Admin. Code tit. 6, §§ 31.2.9 (responsibility for IDEA compliance "applies to all New Mexico public agencies that are *responsible* under laws, rules, regulations or consensual arrangements for providing educational services for children with disabilities," regardless of whether agency receives IDEA funds or whether "it provides special education and related services directly, by contract by referrals to private schools or facilities or through other arrangements") (emphasis added), 31.2.7(C)(16) (A "state-supported educational program" is publicly funded and "*provides* special education and related services to children with disabilities *who come within* the program's educational jurisdiction.") (emphasis added). The DPHO found that NMMI does not provide special education programs, at least in accordance with the IDEA, and this finding is supported by the record. R. at 251, ¶ 44. The DPHO reasoned that the above language cannot let NMMI "off the hook" because "[s]chools cannot be permitted to avoid the impact of the federal law simply by determining that they will not provide services to children with disabilities." R. at 259 n.4.

The matter is more nuanced. NMMI's responsibilities must be viewed against a backdrop of state law and the facts of this case. The purpose of the IDEA was not to displace the primacy of the States in education, but to assist them in extending special education and related services to children with disabilities. Rowley, 458 U.S. at 207-08. New Mexico has chosen to implement its free and open public schools through school districts and public schools. N.M. Const. art. XII, § 1; N.M. Stat. Ann. §§ 22-1-4(A), (C). NMMI is not part of a school district, and is not considered a "public school" within the meaning of the

Public School Code. See supra note 8; N.M. Stat. Ann. § 22-1-2(R) (defining "school district" as "an area of land established as a political subdivision of the state for the administration of public schools and segregated geographically for taxation and bonding purposes"); Daddow v. Carlsbad Mun. Sch. Dist., 898 P.2d 1235, 1241-43 (N.M. 1995) (discussing characteristics of local school boards and distinguishing them from state educational institutions). New Mexico also has arranged for school districts to provide special education.[12] N.M. Stat. Ann. § 22-13-5. From a functional approach, NMMI's purpose (providing military education and training) is different from a public school's purpose of implementing the uniform system of free public schools sufficient for the education of, and open to, all children of school age in the state.

It is uncontroverted that Student's LEA is Los Alamos Public School District or the Taos Municipal School District. Student is not within NMMI's "educational jurisdiction." N.M. Admin. Code tit. 6, §§ 31.2.7(C)(16). Plaintiffs suggest that this case is analogous to a situation where a student receives special education in Albuquerque, moves to Las Cruces and is denied special education on the grounds that he could move back to Albuquerque. Doc. 15 at 7. The court disagrees. The case is not about transferring

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[12] The New Mexico School for the Visually Handicapped and the New Mexico School for the Deaf and also provide special education. N.M. Stat. Ann. §§ 21-5-1, 21-6-2(A). Even though these schools come within the reach of the IDEA, 34 C.F.R. § 300.2(b)(1)(iii), no one would suggest that non-visually impaired or non-deaf children with disabilities must be admitted to these institutions under the IDEA.

from one public school district to another, with the new school providing a FAPE by adopting the former school's IEP or developing one of its own. See 34 C.F.R. pt. 300 app. A at 109-10 (Q & A #17); N.M. Admin. Code tit. 6, § 31.2.11(H). Nor is it a case where the LEA makes a referral to another public or private entity in cooperation with the parents to meet the special educational needs of the child. Nor is it a case where parents disagree with the LEA's IEP, notify the school district, and decide to place the student in private school and seek reimbursement. See Florence County Sch. Dist. v. Carter, 510 U.S. 7, 12-13 (1993).

Instead, in the context of the IDEA, this is a case about Plaintiffs' unilateral choice of a particular type of school, one that provides a military-based, residential education. No diagnostic or evaluation report, no recommendation from an IEP team, nor any other evidence defined the nature of the special education or related services that Student needs or the elements, scope or duration of the program that should be designed post-RTC. R. at 25. Nor was there any evidence making or recommending a referral to NMMI as appropriate to provide a FAPE to address Student's needs.

A. Exhaustion Concerns. Though not raised by the parties, the court always has been concerned about what appears to be a lack of exhaustion in this case.[13] The statute requires that Plaintiffs exhaust administrative measures for available relief before filing a civil action. 20 U.S.C. § 1415(l). In Padilla ex

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[13] NMMI has denied that Plaintiffs have exhausted. See Docs. 1 at 2, ¶ 3; 6 at 2, ¶ 4.

rel. Padilla v. Sch. Dist. No. 1, 233 F.3d 1268, 1274 (10th Cir. 2000), the Tenth Circuit determined that "available relief" means a relief for the events, conditions or consequences complained of, not necessarily the relief preferred. Plaintiffs always have alleged that Student is being denied a FAPE in the LRE. Doc. 1 at 7, ¶ 40; R. at 119 ("This request for due process is properly brought against NMMI as a state-supported school responsible for provision of FAPE to an eligible student."). While the particular relief sought by Plaintiffs is admission to NMMI, no showing has been made that the more pertinent relief (a FAPE pursuant to an IEP in a LRE) is not available through Student's public school district. Nor has a showing been made that such relief is unavailable under the IDEA or it would be futile to make such an attempt. See Cudjoe v. Indep. Sch. Dist. No. 12, 297 F.3d 1058, 1063 n.6 (10th Cir. 2002).

In Cudjoe, the Tenth Circuit provided a comprehensive definition of exhaustion under the IDEA and after noting the statutory requirement, commented on the policy reasons for it. Id. at 1063-68. "[T]he policy supporting the exhaustion requirement also counsels that parents turn first to education professionals, as opposed to courts, to remedy disputes over a child's education." Id. at 1065. That policy is not satisfied by the Plaintiffs' unilateral choice of NMMI as the provider of a FAPE–to the exclusion of the obvious provider in the first instance–Student's public school district of residence. After all, the objective is a FAPE developed through an IEP in the LRE, not a particular school. See id. at 1066-67.

B. IDEA Guarantees a FAPE, Not Unilateral Choice. Be that as it may, a unilateral choice of NMMI

simply goes beyond the obligations imposed by the IDEA on the State in this case. The Supreme Court and the Tenth Circuit have recognized that a FAPE is one that affords the child the opportunity to receive some educational benefit, not one that maximizes the child's potential. As the Court stated in Rowley:

> Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

458 U.S. at 203-04. Thus, the State is not required to provide an education that will maximize a child's potential "commensurate with the opportunity provided non-handicapped children." Id. at 200. Accord Urban v. Jefferson County Sch. Dist. R-1, 89 F.3d 720, 727 (10th Cir. 1996) (student received an appropriate education though not within his school of choice); Murray, 51 F.3d at 930 (LRE mandate lacked a presumption of neighborhood schooling); Schuldt v.

Mankato Indep. Sch. Dist. No. 77, 937 F.2d 1357, 1361-62 (8th Cir. 1991) (same); see also White ex rel. White v. Ascension Parish Sch. Bd., 343 F.3d 373, 378-79 (5th Cir. 2003) (IEP met the requirements of a FAPE even though not at neighborhood school).

Plaintiffs contend that IDEA cases holding that students may receive a FAPE at other placements than a neighborhood school are distinguishable because the neighborhood placement was sought for non-academic reasons and the students had alternatives. Doc. 15 at 4-5. According to Plaintiffs, Student has no like alternatives to NMMI and NMMI is not offering a second site location to Plaintiff. This misses the mark. As noted, Student has at least one unexhausted alternative in this case–the Los Alamos School District. No requests were made for an updated IEP and there has been a decided lack of emphasis on the IEP (and its central role in securing a FAPE) in this case. The reasons for rejecting that alternative were social and based upon personal preference. See supra note 3 and accompanying text. As discussed below, the court rejects the notion that the IDEA requires NMMI to offer a FAPE in the form of a military education to Student.

(11) Plaintiffs' Position.

Plaintiffs contend that the IDEA applies to NMMI in these circumstances because (A) NMMI students have rights under the IDEA, (B) proper statutory construction of IDEA includes NMMI, (C) the 1997 IDEA amendments on charter schools are dispositive, and (D) Supreme Court precedent supports the application of the IDEA to NMMI. The court addresses these arguments in turn.

A. Students' Rights Under the IDEA. Plaintiffs fault the AAO for grounding her analysis (concerning failure to state a claim) on the Parents' request for due process before the SEA. Doc. 13 at 7. They contend that even though the IDEA statute "does not specify the inclusion of NMMI," it does specify who has the right of FAPE, specifically, a child with a disability. Doc. 13 at 7. Plaintiffs argue that designation as an LEA is not the only way a school becomes subject to IDEA, and that the real issue is whether a prospective or enrolled student at NMMI waives the IDEA guarantee of a FAPE. Plaintiffs contend that even a child in a private school has the right to receive a FAPE.

At the outset, it is important to note that the court does not pass on whether NMMI must provide a FAPE for a child with a disability admitted to NMMI, although the state department of education has answered in the negative. R. at 182-86. The court simply does not have these facts before it and will not render an advisory opinion. Having considered the IDEA statutes and regulations, as well as the New Mexico implementing regulations, in these circumstances, the court does not find a fit. This is true, even given a broader focus than whether NMMI is an LEA.

Turning to the analogy between private schools and NMMI, the IDEA does provide for participation of parentally placed private school children where the private school is in a school district served by an LEA. 20 U.S.C. § 1412(a)(10)(A)(i). In those circumstances, amounts expended by the LEA must be equal to a proportionate share of federal funds made available. Id. §1412(a)(10)(i)(I). However, the statute is clear the

law "does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." Id. § 1412(a)(10)(C)(i); 34 C.F.R. § 300.403(a). Where there are disagreements about the availability of a FAPE, the parents may invoke the due process procedures of the Act. Id. § 300.403(b). While the LEA has various consultation responsibilities, 20 U.S.C. §§ 1412(a)(10)(A)(i)(II), (ii)(II), (iii), (iv), (v), the court cannot agree that in circumstances like this (where the adequacy of the FAPE provided by the LEA has not been challenged) that parentally-placed children in private schools are entitled to a FAPE at the private school. See 34 C.F.R. § 300.403(a). And nothing in the IDEA suggests that private schools are required to waive admission standards to enable every child to attend. The analogy of parental placement in a private school is not persuasive in these circumstances.

B. Statutory Construction of IDEA. Plaintiffs argue that proper statutory construction of IDEA would include NMMI. Relying upon Rowley, Plaintiffs argue that the result in this case ought to be consistent with Congressional intent to provide equal access to education. 458 U.S. at 188-200. They then cobble together various observations in the Congressional findings to suggest that the 1997 amendments to the IDEA moved it beyond the goal of "full equality of opportunity." 20 U.S.C. § 1400(c)(2) (1997) (amended 2004). According to Plaintiffs, the focus of the IDEA now is on creating success for children with disability by "ensuring . . . access in the

general curriculum to the maximum extent possible," coordinating educational improvement efforts "to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where they are sent," providing appropriate special education services "in the regular classroom to such children, whenever appropriate," and supporting professional development of those who work with disabled children to enable those professionals "to meet . . . to the maximum extent possible, those challenging expectations that have been established for all children." 20 U.S.C. § 1400(c)(5)(A), (C), (D), (E)(i) (1997) (amended 2004). These are observations on how education of children with disabilities may be made more effective, they simply do not support the theory that special education is merely a service that must be provided wherever the student chooses to attend school.

Plaintiffs' theory is that every state-supported school must provide special education because Congress attempted to describe every conceivable form of public schooling in the IDEA. Doc. 13 at 10. They maintain that the NMMI's lack of special education affects the admission procedures and screens out students like the one before the court. Id. According to Plaintiffs, this is inconsistent with "full educational opportunity," 20 U.S.C. § 1412(a)(2), because the LRE requirement portends education in a regular classroom to the maximum extent possible. Doc. 13 at 11. Because the State provides an "alternate" regular education environment to Student's non-disabled peers (who seek a college-prep., military-based, residential education) Student is entitled to the same. Id.

The court disagrees. The language of the IDEA, its regulations, and Supreme Court decisions provide a better guide to its interpretation than a preordained conclusion that no school could possibly be omitted in these circumstances. While it is undeniably true that the reach of the IDEA is not determined by whether a school is receiving IDEA funds, 34 C.F.R. § 300.2(b)(2); N.M. Admin. Code tit. 6, § 31.2.2, the Plaintiffs' argument focuses on a freestanding substantive guarantee without regard to the procedural mechanisms for implementing that guarantee. Were that approach correct, much of the IDEA would be unnecessary because all school entities (public or private) would be required to make all their programs available to all potential students, without regard to suitability, qualifications or academic ability. The Supreme Court has rejected incorporating additional substantive guarantees (such as strict equality in programming choice) onto the IDEA because Congress has not unambiguously communicated such obligations to the States, as it must do under the Spending Clause. Rowley, 458 U.S. at 190 n.11; at 204 n.26.

Plaintiffs suggest that the policy reasons behind an Eleventh Amendment waiver analysis favor a broader interpretation of the IDEA given recent decisions concerning abrogation and waiver of such immunity. Doc. 15 at 2-3. They point to Tennessee v. Lane, 541 U.S. 509, ___, 124 S. Ct. 1978, 1989 (2004), and the suggestion by the Supreme Court that a valid abrogation of a state's Eleventh Amendment immunity pursuant to section five of the Fourteenth Amendment may be grounded upon disability discrimination in public education, at least when it comes to enforcing Title II of the ADA against a State. They also point to recent decisions holding that in accepting IDEA funds,

states waive Eleventh Amendment immunity. See, e.g., M.A. ex rel. E.S. v. State-Operated Sch. Dist. of City of Newark, 344 F.3d 335, 346 (3rd Cir. 2003); Bd. of Educ. v. Kelly E., 207 F.3d 931, 935 (7th Cir. 2000); Bradley v. Ark. Dep't of Educ., 189 F.3d 745, 750-52 (8th Cir. 1999), rev'd on other grounds sub nom., Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2000) (en banc). However, these decisions do not dilute the force of Rowley's premise that substantive obligations should be clearly communicated to the states, as the provisions concerning waiver of immunity would seem to do. See 20 U.S.C. §§ 1403 (waiver of immunity), 1415(i)(2) (granting party aggrieved right to bring civil action in state or federal court).

Plaintiffs' argument, that NMMI's lack of IDEA special education services serves to screen out students with disabilities, implicates consideration of the admissions standards which are designed to ensure that students have a reasonable chance of success for a military education and do not adversely affect other students. Tr. (12/9/2003) 377-78, 397, 427-28; Resp. Ex. B at 4. Such predictions are important because NMMI has a high attrition rate for new students–25% in 2002, with an average of 17-20% from 1995-2002. Tr. (12/9/2003) 413-14. All high school students at NMMI are required to be part of the Corps of Cadets and participate in Junior ROTC with such activities as close order drill, manual of arms, and living in a very close environment. Tr. (12/9/2003) 379, 386, 425, 430. Short-term disabling conditions (such as a sprained ankle or heat stroke) may be accommodated, but only where the student has met the admission requirements in the first instance. Tr. (12/9/2003) 384-85, 422-24 (student must be "otherwise qualified").

The DPHO found that Student did not meet the NMMI admission standards. Tr. (12/10/2003) 956. The AAO found that NMMI denied Student admission. R. at 11, ¶ 23; 20. The NMMI Catalog has physical and behavioral standards for admissions. Resp. Ex. B at 3-4 [2002-2004 Catalog at 37-38].[14] NMMI's reasons for Student's rejection– presence in a residential treatment facility, past drug use and experimentation, and need for ongoing medication and counseling–are but an application of its admissions standards. The NMMI catalog lists the following disqualifying behavioral standards:

> • Manic-depressive disorder, regularly scheduled psychological counseling or any other severe psychological disorders or limiting condition which in the opinion of the medical staff would interfere with the cadet's ability to function satisfactorily at the New Mexico Military Institute, demonstrated an inability to meet the existing NMMI academic requirements without significant accommodations that

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[14] The catalog provides:

> In addition to meeting reasonable standards of good health, applicants to the NMMI high school and junior college must demonstrate a pattern of good conduct, a willingness to accept responsibilities for their actions and a respect for others. . . . [Applicants] must have exhibited the capacity to adjust to and work effectively in a closely supervised, highly disciplined and occasionally stressful environment.

Resp. Ex. B. at 2-3 [2002-2004 Catalog at 37-38]..

would alter the academic mission of the institute,

- A drug addiction[.]

Resp. Ex. B at 3 [2002-2004 Catalog at 38]. The catalog also provides that "Chronic or acute disabilities existing before or after matriculation are causes for dismissal." Resp. Ex. B at 4 [2002-2004 Catalog at 39].

Applying these requirements, NMMI had justifiable concerns about Student's potential for success in the program based upon Student's past behavior. Student admitted a drug addiction and seven months of treatment in a residential setting. Tr. (12/8/2003) 231-32; Tr. (12/10/2003) 729, 741; Pet. Ex. 29 at 5. Additionally, Student had been diagnosed with bipolar disorder and ODD, and was receiving regular medication. Docs. 1 at 3, ¶ 10; 6 at 2, ¶ 7; see also Pet. Exs. 25 (initial psychiatric evaluation dated September 3, 2003, recounting Student's history and status), 29 at 5-6; Tr. (12/8/2003) 232-33. In the residential treatment setting, Student received extensive therapy. Tr. (12/10/2003) 732-33; Pet. Ex. 29 at 5. The NMMI medical staff was aware of Student's general situation. Pet. Ex. 31. A physician consulted by the staff requested additional information, but the admissions process apparently concluded without consideration of that information. Tr. (12/9/2003) 562, 566. Be that as it may, the admissions staff had the input of Student's therapist at the RTC, Pet. Exs. 5 at 2, 7, and no evidence suggests that further medical information would have changed the outcome given the

combination of factors NMMI found troubling.[15] Moreover, NMMI had valid concerns about drug addiction for which no consultation would appear to be required. As the treatment notes confirm, see Resp. Ex. D, Student's behavioral problems had been ongoing (chronic) and the questions raised about Student's ability to succeed in the program were objectively reasonable. Thus, Student's rejection was based upon not meeting the admission standards, not the lack of special education at NMMI.

Plaintiffs' argument that full educational opportunity in the least restrictive environment means a regular education (or an alternative to a regular education like NMMI) is unavailing. The LRE provision is to encourage "to the maximum extent appropriate" educating children with disabilities with children who are not disabled, in other words, not segregating disabled children. 20 U.S.C. § 1412(a)(5); Honig v. Doe, 484 U.S. 305, 311 (1988). The Tenth Circuit rejected a similar theory of grafting additional substantive obligations onto a State based upon its LRE provision. O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, 144 F.3d 692, 700-01 (10th Cir.

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[15] The record indicates that NMMI has admitted students with ODD, depression and bipolar disorder, but the NMMI program was in no way modified for such students. Tr. (12/9/2003) 628, 646-48. An NMMI counselor testified that he had yet to see a cadet with ODD do well at NMMI because the cadet would have difficulty (1) with the chain of command and taking orders from persons of like-age or younger, and (2) classroom behavior, such as "acting out" is not tolerated. Tr. (12/9/2003) 652-53. The counselor also testified that "[d]iagnos[i]s is more an impression than it is a fact," and that he would want to evaluate the "physical exam, school records, [and] behavioral records." Tr. (12/9/2003) 653-54. That certainly was done in this case.

1998). A LRE does not guarantee a disabled student any program of the student's unilateral choice, irrespective of admission standards.

C. Charter School Amendments to IDEA. Plaintiffs argue that the 1997 IDEA amendments including charter schools within the IDEA are dispositive. See 20 U.S.C. § 1413(a)(5) (1997) (amended 2004); 34 C.F.R. §§ 300.2(b)(1)(ii), 300.18(b)(2), 300.22, 300.190(b), 300.241, 300.312. They point out that if a public charter school is not an LEA, or a school of an LEA, then the SEA must ensure IDEA compliance. Id. § 300.312(b)-(d). They suggest that the same should be true of NMMI, and that the state department of education's decision to appoint a DPHO in this case is indicative of its seeking to ensure NMMI's compliance with the IDEA.

In New Mexico, charter schools are free public schools that operate within school districts and are accountable in many respects to the local school board. N.M. Stat. Ann. § 22-8B-5(C). Charter school students have rights under the IDEA and New Mexico law. 20 U.S.C. § 1413(a)(5); N.M. Stat. Ann. § 22-8B-4(A); N.M. Admin. Code tit. 6, § 31.2.11(I)(1) ("Children with disabilities who otherwise qualify for admission to a charter school may not be denied admission, services or benefits because of their disabilities or their needs for special education and related services."). Yet charter schools may have enrollment procedures and preferences. N.M. Stat. Ann. § 22-8B-4.1. Merely because the SEA exercises ultimate authority over IDEA compliance for charter schools (and other schools) does not make NMMI subject to the IDEA. The state department of education assigned a DPHO recognizing that an important issue existed as to

whether NMMI owed the Student any duties under the IDEA or section 504 of the RA. R. at 140. The State has complied with its IDEA obligations in this matter.

D. Supreme Court Cases. Plaintiffs argue that various Supreme Court cases favor application of the IDEA to NMMI. They rely upon Cedar Rapids Community School District v. Garrett F., 526 U.S. 66, 79 (1999), which held that the IDEA's definition of "related services" included nursing services to enable a student to attend school. They further rely upon Supreme Court cases in other contexts vindicating the rights of mentally retarded and disabled persons as indicative of a trend of providing equal rights for persons with disabilities. Doc. 13 at 16-18. They suggest that "NMMI is an anachronism as it presently exists in its refusal to provide special education consistent with the IDEA" and its status as a publicly-funded high school is dispositive. Id. at 18. As previously explained, the court must resolve the case based upon the federal and state statutes and regulations, as opposed to the policy grounds urged by the Plaintiffs.

Plaintiffs also rely upon United States v. Virginia, where the Supreme Court held that Virginia Military Institute's exclusion of women from its educational opportunities violated equal protection, and a separate and unequal alternative was not an adequate remedy. 518 U.S. 515, 545-46, 554-56 (1996). Plaintiffs suggest that just as gender-based generalizations could not be used to deprive women of the unique character of a military education, such generalizations cannot be used to deny students with disabilities a military-based education at NMMI. Doc. 15 at 8. The DPHO also relied upon United States v. Virginia, as

well as the IDEA's aspiration of "full educational opportunity" and access to non-academic and extracurricular services. R. at 261-62 (citing 20 U.S.C. § 1412(a)(2) and 34 C.F.R. § 300.305).

In United States v. Virginia, the Court pointed out that the women on whose behalf a remedy was required were capable of performing all the individual activities required of male cadets and could meet the required physical standards. 518 U.S. at 550-51. This case is concerned with non-gender related alteration of NMMI's admission standards. NMMI contends and provided evidentiary support that such course would lead to a fundamental alteration of the NMMI program–replacing the single-track program in which all students participate to one in which some will participate and some will not. The court is not persuaded that the goal of "full educational opportunity," in the context of the IDEA, requires more than what the Supreme Court indicated in Rowley.

(12) Disposition of Plaintiffs' Non-IDEA Claims. The parties disagree about what should happen next if the court holds that Plaintiffs cannot prevail on their IDEA claim against NMMI. NMMI acknowledges that, as part of its policy on equal opportunity, in compliance with federal law including the RA and the ADA, it does not discriminate on the basis of disability in admissions standards. Pet. Ex. 22 at 14. Defendants urge that the RA and ADA claims must be dismissed because they are derivative of the IDEA claim. Doc. 14 at 20-22.

In Southeastern Community College v. Davis, 442 U.S. 397 (1979), the Court considered whether section 504 of the RA precluded a professional school from

imposing admission requirements, specifically hearing ability. The court concluded that an "otherwise qualified person is one who is able to meet all of a program's requirement in spite of his handicap." Id. at 406. The Court also concluded that the professional school was not required to engage in affirmative action and alter the program to allow the student to attend. Id. at 409-12; see also Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141, 152-53 (1st Cir. 1998) (under the ADA, private college preparatory school was not required to transform into special needs school and retain student with severe behavioral problems); Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791, 795 (1st Cir. 1992) (under RA, school was not required to substantially alter program requirements to accommodate student with disability).

Relying on Davis, and the similarity between the substantive and procedural frameworks of the IDEA and section 504, see 34 C.F.R. §§ 104.31–104.39 (RA regulations similar to IDEA standards), the Tenth Circuit has held that if a disabled child was not entitled to a neighborhood placement under the IDEA, the same result was warranted under section 504 of the RA, and the ADA. Urban, 89 F.3d at 727-28. The court noted that a school district is not required to modify its program to accommodate a single child in a neighborhood school, particularly where the child is receiving educational benefits in another environment. Urban, 89 F.3d at 728.

Section 504 of the RA requires the same FAPE required by the IDEA. See Mo. Dep't of Educ., 358 F.3d at 998. Although the court cannot say precisely what educational benefits Student is receiving presently, at the time of Student's application to NMMI, she was

receiving educational benefits in another setting without complaint.

Plaintiffs suggest that under 20 U.S.C. § 1415(l), the IDEA may not be construed to restrict rights available under the RA or ADA and that the court has jurisdiction over both claims. See Padilla, 233 F.3d at 1272-73. Plaintiffs also contend that only the IDEA issues were contemplated by the court's entry of the stipulated order establishing a briefing schedule and that only IDEA issues were addressed in Plaintiffs brief-in-chief. See Doc. 12 (stipulated briefing order). They further contend that the AAO dismissed the claim without reaching the merits. See R. at 20. Plaintiffs request a Fed. R. Civ. P. 16 conference and discovery on the remaining claims.

The court is not persuaded by Plaintiffs' arguments. While it is true that the IDEA is not an exclusive remedy, Urban considered the procedural and substantive guarantees of the IDEA and ADA (through the lens of the RA) and determined that relief was not warranted under either. Plaintiffs have not explained how the RA claim would differ from the IDEA claim or how it would provide for an independent basis of relief. See R. at 41 ("NMMI overlooks that IDEA, not Section 504, is the primary vehicle for [Student's] challenge to . . . rejection by NMMI."). The issue here is whether NMMI has a responsibility to provide Student with a FAPE (absent Student's admission) under the IDEA –if this claim fails, so does the RA claim. N.L. ex rel. Mrs. C. v. Knox County Schs., 315 F.3d 688, 695-96 (6th Cir. 2003) ("In sum, precedent has firmly established that section 504 claims are dismissed when IDEA claims brought on the theory of a denial of free appropriate public

education are also dismissed."). Nothing precluded Plaintiffs from responding to Defendants' arguments concerning the proper disposition of the ADA and RA claims. The fact that the AAO on legal grounds declined to consider an RA claim in no way restricts this court from another legal resolution. Finally, given the nature of the resolution, Plaintiffs have not indicated how discovery would assist.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED that no relief shall be granted to the Plaintiffs on their IDEA claim, all claims are dismissed with prejudice, and judgment will be entered in favor of Defendants.

DATED this 7th day of February 2005, at Santa Fe, New Mexico.

/s/ Paul Kelly J.
United States Circuit Judge
Sitting by Designation

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No. 09-429

In The Supreme Court of the United States

SARAH ELLENBERG,

Petitioner,

v.

NEW MEXICO MILITARY INSTITUTE, and the BOARD OF REGENTS OF THE NEW MEXICO MILITARY INSTITUTE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a public school student who is eligible for an Individualized Educational Plan (IEP), due to a behavioral disorder, is automatically considered "handicapped" under Section 504 of the Rehabilitation Act or "disabled" under Title II of the Americans with Disabilities Act (ADA), thus eliminating the need to prove that she is disabled/handicapped under the statutory definitions contained in the ADA and Rehabilitation Act.

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STATEMENT OF THE CASE

Glaringly absent from Petitioner Sarah Ellenberg's "Statement of the Case" are those facts which make this case decidedly a poor candidate for this Court's review. Thus, Respondent New Mexico Military Institute (NMMI) provides the following Statement of the Case pursuant to Supreme Court Rule 15.2.

NMMI is a state educational institution that offers a college preparatory education in a military-style setting. NMMI's admission standards require that applicants, among other things, have no major disciplinary, drug, or alcohol problems. Sarah Ellenberg had a history of behavior inconsistent with this requirement.

In 2000, shortly after she moved to New Mexico, Ellenberg stole her parents' car and credit card, and her parents pressed charges against her. Because of this incident, and to address her substance abuse problems, Ellenberg was placed in a residential treatment program in Taos, New Mexico. In November of 2002, the Taos Municipal School District evaluated Ellenberg and concluded she was qualified for special education services on the basis that she was diagnosed with Oppositional Defiance Disorder. Accordingly, the school district developed an IEP for Ellenberg.

While in the residential treatment facility, Ellenberg applied to NMMI for admission for the Fall 2003 semester. NMMI notified Ellenberg and her parents

that she would not be admitted for the upcoming fall semester. The reasons given for NMMI's decision included: 1) Ellenberg's admitted past drug use, 2) her presence in a residential treatment program, 3) her present medication requirements, and 4) her need for continued counseling. NMMI advised Ellenberg and her family, however, that she would be considered for admission the following spring semester if she demonstrated the ability to succeed "in an educational environment other than a Residential Treatment Facility." Ellenberg did not reapply.

Rather than re-apply after Ellenberg completed her treatment, Ellenberg's parents pursued an IDEA administrative claim, culminating in a due process hearing. After failing to persuade the due process hearing officer of the merits of her claim, Ellenberg's parents filed suit in federal court, asserting claims under (1) the IDEA, (2) Section 504 of the Rehabilitation Act, and (3) Title II of the ADA. The district court rejected Ellenberg's IDEA claim, finding NMMI had satisfied its IDEA obligations. The district court further found that because NMMI complied with the IDEA, Ellenberg's ADA and Section 504 claims failed as a matter of law.

On appeal, the Tenth Circuit affirmed the dismissal of the IDEA claim, but reversed the dismissal of Ellenberg's claims under the ADA and Rehabilitation Act. The case was remanded for reconsideration of Ellenberg's ADA and Rehabilitation Act claims. *Ellenberg v. New Mexico Military Institute*, 478 F.3d 1262 (10th Cir. 2007).

After remand, Ellenberg amended her federal court complaint, but failed to come forward with evidence that she is an otherwise qualified disabled or handicapped person as contemplated by the ADA or § 504, preferring to stand on her previous determination of eligibility for services under the IDEA. NMMI filed a motion for summary judgment on Ellenberg's Section 504 and ADA claims, pointing out Ellenberg's inability to make a prima facie showing of "disability" pursuant to the ADA or "handicap" under the Rehabilitation Act. The district court agreed and granted summary judgment in favor of NMMI. The Tenth Circuit affirmed the district court, and rejected Ellenberg's argument that her entitlement to an IEP under the IDEA automatically rendered her "disabled" under the ADA or "handicapped" under Section 504. *Ellenberg v. New Mexico Military Institute*, 572 F.3d 815 (10th Cir. 2009).

ARGUMENT

A. Ellenberg's "Question Presented" Is Overly Broad

Ellenberg asserts that the following question is before this Court:

> Whether a school-aged person with current status as a "child with a disability" eligible for special education under the Individuals with Disabilities Education Act is, on the basis of such status, protected from disability discrimination by public schools under

> Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act.

Ellenberg's "question presented" is overly broad because even if the Court accepted Ellenberg's position that she is automatically considered "disabled" under the ADA or "handicapped" under Section 504, she would not necessarily be entitled to protection under those statutes. In addition to showing she has a disability and/or is handicapped, Ellenberg must also show that she is qualified, with or without reasonable accommodations and that she was discriminated against because of her disability. *See Davidson v. America Online, Inc.*, 337 F.3d 1179, 1188 (10th Cir. 2003); *Jarvis v. Potter,* 500 F.3d 1113, 1121 (10th Cir. 2007). Only then would Ellenberg be entitled to "protection" under the ADA or the Rehabilitation Act. As noted below, the record lacks even an allegation that Ellenberg was qualified, with or without accommodation, or evidence indicating what type of reasonable accommodations NMMI could provide to make Ellenberg's attendance at NMMI possible.

B. Accepting This Case For Review Would Be A Waste Of Judicial Resources

The Tenth Circuit, in a well-reasoned decision, correctly ruled that Ellenberg's receipt of special education services at her high school does not automatically render her "disabled" under the ADA or "handicapped" pursuant to the Rehabilitation Act. No

sound legal reason exists for reversing the Tenth Circuit's decision. Accordingly, it would not be economical for the Court to review the Tenth Circuit's decision.

1. Ellenberg Cannot Rely On Her Diagnosed Condition As A Basis For Claiming She Is Handicapped Under The Rehabilitation Act

First, the mere fact that Ellenberg was diagnosed with a psychological condition (Oppositional Defiance Disorder) does not automatically qualify her as "disabled" under the ADA or "handicapped" under the Rehabilitation Act, and relieve her of the burden of proving that her condition is "a 'disability' for [her specifically] as defined by the Act." *Williams v. City of Charlotte, N.C.*, 899 F. Supp. 1484, 1488 (W.D.N.C. 1995); *see also Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 164 (5th Cir. 1996) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.") (citations and quotations omitted). In other words, not every person who has a diagnosis from a physician is, per se, "disabled" or "handicapped." A plaintiff who brings a claim under the ADA or the Rehabilitation Act must present evidence of a disability – which Ellenberg did not do.

2. Ellenberg Offers A Faulty Regulation Interpretation To Support Her Claim That She Is "Handicapped" Under The Rehabilitation Act

In addition, Ellenberg's argument that, as the recipient of an IEP from the Taos Municipal School District, she was relieved of the burden of proving that she was "disabled" or "handicapped" in her lawsuit against NMMI, was rejected by the district court, the Tenth Circuit, and would certainly be rejected by this Court. Ellenberg's argument ignores sound principles of statutory construction and fails to credit years of precedent that teach the proper way to analyze a claim brought pursuant to the Rehabilitation Act.

To qualify for relief under the Rehabilitation Act, a plaintiff must demonstrate that (1) she is a handicapped person within the meaning of the Act; (2) she is otherwise qualified; (3) the program receives federal financial assistance; and (4) she was discriminated against because of the handicap. *Hollonbeck v. U.S. Olympic Comm.*, 513 F.3d 1191, 1194 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 114 (2008). Definitions contained in the regulations that implement the Act determine whether an individual is eligible for relief. Those regulations require a two-part analysis of whether an individual is "handicapped." First, the individual must be a "handicapped" person, which is defined as a person who has a physical or mental impairment that "substantially limits one or more major life activities" (or has a record of such impairment, or

is "regarded as" having such an impairment). 34 C.F.R. § 104.3(j)(1). Second, the individual must be a "*qualified* handicapped person." A *qualified* handicapped person is defined as a *handicapped* person who meets certain other qualifications, one of which is that the individual is entitled to a free appropriate public education under the IDEA. 34 C.F.R. § 104.3(l)(2). Read as a whole, then, the regulations provide that an individual is not covered by the Act unless she is:

1) a "handicapped" person (substantial limitation of a major life activity); and

2) a "qualified" handicapped person (such as a person who is IDEA eligible).

Ellenberg argued to the Tenth Circuit that because she was IDEA eligible (she received special education services), she was automatically a handicapped person under the Rehabilitation Act. The court rejected her argument because she skipped the first step in applying the regulations: She failed to offer evidence that she was handicapped by virtue of a substantial limitation of a major life activity.[1]

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[1] The analysis under the ADA is even more straightforward because the ADA does not have a reference to the IDEA similar to that contained in the implementing regulations of the Rehabilitation Act at 34 C.F.R. § 104.3(l)(2). Similar to requirements under the Rehabilitation Act, to satisfy the ADA's definition of disability, a plaintiff must " '(1) have a recognized impairment, (2) identify one or more appropriate major life activities, and (3) show the impairment substantially limits one

(Continued on following page)

3. Ellenberg Proposes An Unworkable Approach To Determining Whether Individuals Are "Handicapped" Under The Rehabilitation Act

Furthermore, Ellenberg's argument that every individual who is IDEA eligible is automatically handicapped under the Rehabilitation Act is unworkable, because the statutory definitions of "child with a disability" under the IDEA and "handicapped person" under the Rehabilitation Act are notably different. The definition of a child with a disability under IDEA, at 20 U.S.C. § 1401(3)(A), is a child:

> (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.

Notably absent from this definition is a requirement that the child's impairment "substantially limit a major life activity." The definition of "handicapped

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or more of those activities.'" *Berry v. T-Mobile*, 490 F.3d 1211, 1216 (10th Cir. 2007) (quoting *Holt v. Grand Lake Mental Health Ctr., Inc.*, 443 F.3d 762, 765 (10th Cir. 2006)). As noted by the Tenth Circuit, Ellenberg's failure to put forward a specific argument of how her disability substantially limits a major life activity precludes her claim under the ADA. *See Ellenberg*, 572 F.3d at 824.

person" under the Rehabilitation Act, on the other hand, requires proof that the impairment substantially limits a major life activity. 34 C.F.R. § 104.3(j).

Ellenberg's proposition that all students who receive special education services pursuant to the IDEA are automatically "handicapped" pursuant to the Rehabilitation Act is unworkable because the two statutes have distinct purposes. As noted by the court in *Bowers v. National Collegiate Athletic Ass'n,* 563 F. Supp. 2d 508, 533 (D.N.J. 2008), "[a]lthough both the Rehabilitation Act and the IDEA provide certain forms of relief for children with disabilities, the statutes have distinct purposes: while the Rehabilitation Act provides relief from discrimination, the IDEA provides relief from inappropriate educational placement decisions, regardless of discrimination." In distinguishing the definition of "handicapped person" under the Rehabilitation Act and a "child with a disability" under the IDEA, the *Bowers* Court stated as follows:

> As these separate statutory treatments of the terms 'disability' and 'handicapped' make clear, a special education student is not necessarily a qualified individual with a disability under the Rehabilitation Act. . . . [T]he likelihood of overlap [between the IDEA and Rehabilitation Act] does not, as Plaintiff argues, mean that a student receiving special education services under the IDEA is per se handicapped under the Rehabilitation Act, and does not relieve Plaintiff of her burden of proving by a

> preponderance of the evidence that Bowers had a physical or mental impairment which substantially limit[ed] one or more major life activities.

Id. (some internal citation and quotations omitted).

Many students who qualify for special education services may also be substantially limited in a major life activity. That does not mean, however, that all students who qualify for such services are substantially limited in a major life activity. For that reason, it is unworkable to conflate the definitions of "qualified handicapped" persons under the Rehabilitation Act and "child with a disability" under the IDEA. Additionally, as noted in *Bowers,* the legislative history of the Rehabilitation Act "'does not indicate that a violation of the IDEA is a per se violation of the Rehabilitation Act . . . a plaintiff must still prove that there was a violation of the Rehabilitation Act.'" *Id.* (quoting *Andrew M. v. Delaware County Office,* 490 F.3d 337, 349 (3rd Cir. 2007)). Ellenberg failed to identify any evidence that her emotional disturbance substantially limited any of her major life activities. Instead, she relied upon a flawed argument that her receipt of special education services in high school automatically rendered her "disabled" or "handicapped" for purposes of suing NMMI under the ADA and the Rehabilitation Act. The district court and the Tenth Circuit Court of Appeals correctly rejected her argument, and this Court should not expend its resources in reviewing this case.

C. The Tenth Circuit Could Have Affirmed For Any Number Of Reasons

Although the Tenth Circuit affirmed the district court's decision based on NMMI's argument that Ellenberg failed to prove that she was "handicapped" under the Rehabilitation Act or "disabled" under the ADA, the court could have affirmed for any number of reasons.

First, the record contained neither an allegation nor evidence that Ellenberg was otherwise qualified to attend NMMI. This Court has clarified that an "otherwise qualified person" under the Rehabilitation Act is one who is able to meet all of a program's requirements in spite of her handicap. *Southeastern Comm. Coll. v. Davis*, 442 U.S. 397, 398 (1979). Title II of the ADA defines a "qualified individual with a disability" similarly, as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . or the provision of auxiliary aids or services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). The record below shows that the due process hearing officer found that Ellenberg's parents did not meet their burden of proving that Ellenberg met the standards for admission. Ellenberg failed to allege any additional facts to the district court to demonstrate otherwise.

The record also shows that NMMI met its burden of demonstrating, at the summary judgment stage, that Ellenberg was not qualified for admission to NMMI because she did not meet the essential eligibility requirements to attend NMMI. Her personal history, disclosed to NMMI's admissions office through letters from Ellenberg herself, her therapist, doctor, and her parents, alone fit within several of the disqualifying behavioral standards listed in NMMI's catalog. This included her history of conflicts with her family, her arrest, felony charge and sentencing to a residential treatment center, her drug use, and her probationary status in the legal system. These are facts Ellenberg continues to ignore.

Second, Ellenberg failed to even allege what reasonable accommodations she would have required to attend NMMI. "Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person." *Southeastern Comm. Coll.*, 442 U.S. at 398. Likewise, ADA regulations require public entities to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity." 28 C.F.R. § 35.130(b)(7).

NMMI would have been required to substantially modify its admissions criteria and academic program for Ellenberg to be admitted to NMMI. The modifications apparently suggested by Ellenberg – namely, that NMMI ignore its fundamental and long-standing admission standards – would radically alter the core of the NMMI program. Evidence at the due process hearing demonstrated that NMMI's admissions standards are necessary to the integrity of its program. Changes to the admissions criteria would fundamentally alter the nature of NMMI's program, which under either Act is not required. *See Wong v. Regents of the Univ. of California*, 192 F.3d 807, 818 (9th Cir. 1999) (the Rehabilitation Act and the ADA do not require the institution to make fundamental or substantial modifications to its programs or standards). Thus, as is evidenced by the record below, Ellenberg failed to meet her burden to allege and show what *reasonable* accommodations would be necessary for her admission to NMMI, other than fundamentally altering the nature of its program.

D. There Are No "Compelling Reasons" Warranting This Court's Review

Ellenberg's Petition for Certiorari fails to demonstrate any "compelling reasons" for granting the Petition, as Supreme Court Rule 10 demands. Most notably, the Tenth Circuit's decision is not in conflict with another United States court of appeals' decision. The Tenth Circuit is the only court of appeals to have

ruled directly on this issue. The U.S. District Court for the District of New Jersey, the only other court to tackle this issue, like the Tenth Circuit, held that it is improper to conflate the definition of "child with a disability" under the IDEA and the definition of "handicapped" under Section 504 of the Rehabilitation Act. *See Bowers*, 563 F. Supp. 2d at 533.

Additionally, this case does not involve an "important federal question" that would warrant this Court's review. Sup. Ct. R. 10. First, this is not an issue that many courts have reviewed. As noted above, only one federal district court and one federal court of appeals have directly addressed whether a child who has an IEP is automatically considered "handicapped" under the Rehabilitation Act. Presumably, the dearth of authority on this issue is because most school-age plaintiffs who bring claims under the ADA or Rehabilitation Act present prima facie evidence of a disability or a handicap, instead of relying on their status as a child entitled to an IEP under the IDEA.

In her Petition, Ellenberg suggests that the Rehabilitation Act, the ADA and the IDEA should all be read in conjunction to justify the result she advocates. In truth, Ellenberg suggests that the IDEA should be considered alone, and the proof requirements of a claim brought under the ADA and the Rehabilitation Act should be disregarded. Ellenberg further suggests that if the Tenth Circuit's decision stands, the "process" of identifying individuals who need special education pursuant to the IDEA will simply be "for

show." Ellenberg's position fails to appreciate that the IDEA has a distinct purpose apart from the Rehabilitation Act and the ADA. *Bowers*, 563 F. Supp. 2d at 533. *See also Ellenberg*, 478 F.3d at 1275 (citing *Board of Educ. v. Rowley*, 458 U.S. 176, 198 (1982) for the proposition that the IDEA is not an anti-discrimination vehicle). Suggesting the IDEA will be rendered useless if plaintiffs who assert claims under the ADA and Rehabilitation Act must actually prove a disabling condition is overly dramatic, at best. Indeed, regardless of the outcome of this case, the IDEA will continue to be in place to ensure a free and appropriate education to all children who are eligible for special education services. Likewise, the ADA and the Rehabilitation Act will continue to provide relief to real victims of disability discrimination.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

DATED: November 9, 2009

Respectfully submitted,

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No. 09-429

In The
Supreme Court of the United States

SARAH ELLENBERG,

Petitioner,

v.

NEW MEXICO MILITARY INSTITUTE, and the BOARD OF REGENTS OF THE NEW MEXICO MILITARY INSTITUTE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. Protection from disability discrimination for students who are "labeled" through the special education process is an important legal question for millions of children.

To date, the New Mexico Military Institute (NMMI) flies under the radar – evading federal laws which exist to protect the rights of public school students who are disabled. The New Mexico public high school's decades of obstinance might be an anomaly, unique to the isolated rural southwestern United States and of no importance for this Court's review, were it not for the consequences of the Tenth Circuit's decision. First, in New Mexico, students with disabilities are effectively cut off from one public education option available to qualified nondisabled New Mexico high school students – military style college-preparatory high school education. Second, after this decision, across the country, school-aged children, *affixed with a disability label by public schools* through IDEA's detailed statutory process for identification, are not automatically protected under the umbrella of federal laws proscribing discrimination on the basis of disability.

The Tenth Circuit's decision creates a rule of law, completely at odds with the overall framework of federal legislation and national policy applicable to disabled school children, that a student identified as a "child with a disability," under the IDEA must prove "more" in order to receive public education free from

discrimination.[1] If children who have qualified for special education are not *necessarily* entitled to protection from discrimination, a dangerous loophole sanctioning discriminatory conduct threatens to reverse decades of progress allowing access to public education for children with disabilities.

NMMI urges the Court to decline review of this case reserving Rehabilitation Act and ADA protection for "real victims of discrimination." NMMI Brief in Opposition at 15. Over six million school-aged children receive special education pursuant to the IDEA.[2] Application of the Tenth Circuit's decision by school authorities across the country potentially leaves all of these children vulnerable to discrimination on the basis of disability.

While lower courts often minimize attention paid to cases which only apply to children, this Court has not avoided enforcement of laws on behalf of children with disabilities. Review of this case follows logically this

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[1] "Child with a disability" is a term of art under the IDEA. 20 U.S.C. §1401(3)(A)(1997). The term encompasses both identification of a particular disabling condition (20 U.S.C. §1401(3)(A)(i)) and determination that provision of "special education" is needed for the child's participation in public education (20 U.S.C.§1401(3)(A)(ii)).

[2] According to the United States Department of Education, more than six million children received special education under the IDEA during the 2006-2007 school year. *See* IES National Center for Education Statistics, Digest of Education Statistics, "Table 52" at http://nces.ed.gov/programs/digest/d08/tables/dt08_052.asp, last visited 11/24/2009.

Court's repeated willingness to explain the IDEA.[3] Thousands of school districts and thousands and thousands of parents look to this Court's IDEA cases for day to day questions about implementation of special education. Without the Court weighing in now on the necessary intersection between IDEA and federal law prohibiting discrimination on the basis of disability, the goal of federal legislation is endangered.

Special education – as described in the IDEA – is not an end in itself. Its purpose was to reverse states' denial of access to public education for students with disabilities. "[T]he intent of the Act was more to open the door of public education to the handicapped...." *Bd. of Educ. of Hendrick Hudson v. Rowley,* 458 U.S. 176, 192 (1982).[4] Nonstop reliance on the courts to explain the intricacies of special education law will just barely

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[3] From 1982 to the present, the United States Supreme Court has issued eleven decisions which explain the IDEA. *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley,* 458 U.S. 176 (1982); *Irving Ind. Sch. Dist. v. Tatro,* 468 U.S. 883 (1984); *Smith v. Robinson,* 468 U.S. 992 (1984); *Sch. Comm. of Town of Burlington v. Dept. of Educ. of Massachusetts,* 471 U.S. 359 (1985); *Honig v. Doe,* 484 U.S. 305 (1988); *Florence Co. Sch. Dist. Four v. Carter,* 510 U.S. 7 (1993); *Cedar Rapids Comm. Sch. Dist. v. Garret F.,* 526 U.S. 66 (1999); *Schaffer v. Weast,* 546 U.S. 49 (2005); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,* 548 U.S. 291 (2006); *Winkelman v. Parma City Sch. Dist.,* 550 U.S. 516 (2007); *Forest Grove Sch. Dist. v. T.A.,* ___ U.S. ___, 129 S.Ct. 2484 (2009). Two additional decisions interpret the IDEA indirectly. *See Zobrest v. Catalina Foothills Sch. Dist.,* 509 U.S. 1 (1993); *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet,* 512 U.S. 687 (1994).

[4] At the time of this Court's decision in *Rowley,* New Mexico was the only state which continued to decline participation in the IDEA. *See Rowley,* 458 U.S. at 184.

keep the school house door ajar if federal laws prohibiting discrimination against disabled students are evaded. IDEA's process for identifying students with disability must be understood to be synonymous with establishment of protection under the Rehabilitation Act and Title II of the ADA or students identified for special education by public schools are simply identified as targets for discrimination, without protection.

New Mexico Military Institute's Brief in Opposition is intended to create confusion sufficient to divert analysis away from the important federal question presented by Ms. Ellenberg's Petition. While the shrillness can hardly be missed, three claims by NMMI require direct response to eliminate confusion about the history and posture of this case. First, Ms. Ellenberg was not "qualified for special education services on the basis that she was diagnosed with Oppositional Defiance Disorder." Brief in Opposition at page 1. Second, no court has ever found that NMMI "complied with the IDEA." Brief in Opposition at page 2. Third, the record below contains evidence that Ms. Ellenberg was "otherwise qualified," and met the nondiscriminatory standards for admission to NMMI when she applied in the spring of 2003.

II. NMMI doth protest too much.

A. Reliance is not placed on diagnosis to establish disability.

NMMI, which has never complied with the IDEA or provided any kind of special education, misunderstands the process for determination of disability sufficient for eligibility under the IDEA. The

IEP team, which consists of specific people identified by the statute including "qualified professionals", determines eligibility for special education based on the steps required by the statute, not in reliance on a diagnosis given by a provider outside of the public school system. *See* 20 U.S.C. §1414(a), (b), (c) (1997).

Petitioner Ellenberg does not argue that a "diagnosis" is sufficient to establish handicap or disability under the Rehabilitation Act or Title II of the ADA in a public school setting. Rather, her argument is that the *process* for determination of disability sufficient for IDEA eligibility in public schools, based on required steps which include finding that the disability impacts the student's ability access education, is synonymous with proof of disability required for protection under the Rehabilitation Act and Title II of the ADA for public school students.

B. NMMI has never complied with the Individuals with Disabilities Education Act.

It is inaccurate for New Mexico Military Institute to state that the United States District Court found "NMMI had satisfied its IDEA obligations," and that "NMMI complied with the IDEA." Brief in Opposition at page 2. The District Court's first decision in 2005 suggests that NMMI is beyond the reach of federal law. That Court first issued decision for NMMI, not based on any finding of compliance with the IDEA, but on 1) the Court's deference to state law in conflict with the IDEA; 2) misunderstanding about the interrelationship between the IDEA and nondiscrimination laws; and 3) the Court's unwillingness to recognize the fact questions created

by the school's failure to implement IDEA and use of facially discriminatory admissions standards.

The District Court never found that NMMI complied with the IDEA. "The [IDEA due process hearing officer] found that NMMI does not provide special education programs, at least in accordance with the IDEA, and this finding is supported by the record." *Ellenberg v. New Mexico Military Institute,* No. 04CV0347, 2005 WL 5467718 *8 (D.N.M. Feb. 7, 2005). The Tenth Circuit Court of Appeals, in review of the 2005 United States District Court decision, affirmed dismissal of the IDEA claim based on a failure to exhaust IDEA administrative remedy by the Ellenbergs who, according to the appellate court, should have filed for IDEA due process against the student's Local Educational Agency, rather than against NMMI. *Ellenberg v. New Mexico Military Institute,* 478 F.3d 1262, 1275-1279 (10th Cir. 2007).

C. NMMI admissions standards are facially discriminatory.

Unashamedly, NMMI argues that its facially discriminatory admissions standards are "the core of the NMMI program." Brief in Opposition at 13. NMMI is oblivious to the discriminatory character of its admissions policies which include among the "behavioral standards [which are] considered *disqualifying for admission*" to its public high school: "regularly scheduled psychological counseling."

Ms. Ellenberg consistently argued and presented evidence that she met all nondiscriminatory genuine

admissions standards[5] without any need for reasonable accommodation. NMMI's stated requirement that any potential for "regularly scheduled psychological counseling" be sacrificed, as a precondition to high school admission, is at the center of Ms. Ellenberg's disability discrimination claim which was blocked from decision on the merits by the Tenth Circuit's decision upholding summary judgment for NMMI on the basis that Ms. Ellenberg did not establish "disability" sufficient to be protected from discrimination.

III. Conclusion

Petitioner asks this Court to grant her petition for certiorari.

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[5] Issues of fact exist as to whether some of NMMI's proffered admissions standards, such as "past drug use," were actually used by NMMI to exclude nondisabled applicants from admission to the high school.

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